Supreme Court, U.S.
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No. ______

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN E. PELOZA,

Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A federal district court dismissed a public school teacher's federal civil rights and conspiracy suit. In so doing, the district court failed to accept as true the well-pled factsin the Complaint. In a divided panel decision affirming, the U. S. Court of Appeals for the Ninth Circuit rejected the merits of the teacher's free speech and establishment claims.

(1) Did the Ninth Circuit err in limiting a public school teacher's freedom of speech and academic freedom by analyzing Petitioner's right to freedom of speechunder the public employee speech doctrine embodied in this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in conflict with the U. S. Courts of Appeal for the First, Second, Sixth, Seventh, Tenth and Eleventh Circuits, rather than under this Court's "material and substantial disruption standard" for speech in public schools, embodied in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)?

(2) Does a school board policy ordering a teacher not to answer questions from students about religion and not to discuss such matters with his students, at any time while on campus, violate the teacher's right to freedom of speech?

(3) Did the Ninth Circuit err in holding that "Establishment Clause concems trump" a public school teacher's free speech right to candidly reply to questions posed by his students in or out of class?

(4) Did the Ninth Circuit err when itrefused to accept as true the well-pled facts of the Petitioner's First Amendment Complaint in the face of a motion for dismissal brought under Fed. R. Civ. P. Rule 12(b)(6)?

PARTIES

In addition to the parties listed in the caption of this Petition, the following parties participated in the proceeding in the court below: Board of Trustees of the Capistrano Unified School District, Paul B. Haseman, Crystal Kochendorfer, Marlene M. Draper, Annette B. Gude, Kathryn I. Itzel, E. G. Kopp, A. Edward Westberg, Jerome R. Thornsley, William D. Eller, Geraldine Jaffe, Thomas R. Anthony, Ross Velderraine, James Corbett, Paul Pflueger, Ray Panici, Tim Dunn, William Redding and Does 1 through 200.

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PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the United States District Court is reported as *Peloza v. Capistrano Unified School Dist.*, 782 F. Supp. 1412 (C.D.Cal. 1992) (App. 1a) (hereafter referred to as *Peloza* I). The original panel decision of the United States Court of Appeals for the Ninth Circuit, which subsequently was withdrawn, is unreported and appears in the Appendix hereto (App. 18a) (hereafter referred to as *Peloza* II). The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994) (App. 38a) (hereafter referred to as *Peloza* III). The order of the United States Court of Appeals for the Ninth Circuit denying the Petition for rehearing with suggestion of rehearing en banc is unreported and appears in the Appendix hereto (App. 57a).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this case on October 4, 1994. A petition for rehearing with suggestion of rehearing *en banc* was denied on November 25, 1994. This Court has jurisdiction under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

U.S. CONST. amend I, cl. 1-3.

The first section of the Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

U.S. CONST. amend XIV, § 1.

In pertinent part, Title 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

In pertinent part, Title 42 U.S.C. § 1985(3) states:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

In this case, John Peloza, a teacher employed with the Capistrano Unified School District, sued the school district and certain individuals. *See generally* Complaint, App. 58a-77a.

Peloza brought suit after his superiors ordered him not to answer questions from his students about matters involving religion, even when students sought Peloza out during lunch periods, interclass breaks or other noninstructional or nonclass time. App. 60a.[1] That directive, in the view of Judge Poole, dissenting below, would censor discussion "during lunch . . . about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were." App. 53a-54a.

Peloza has been ordered not to answer student inquiries about religious matters. App. 60a, 67a-68a. This prohibition applies only to Peloza and is not limited to discussions in class. Instead, the school district and its employees have prohibited Peloza from answering any such inquiries while "on contract" (i.e., at anytime while working as a teacher). *Id.*

Peloza filed suit in 1991. He alleged that the foregoing conduct of the Respondents injured federal civil and constitutional rights, including the rights to freedom of speech, freedom from an unlawful establishment of religion, due process of law, and equal protection. App. 71a. In addition to his federal civil rights claims, Peloza asserted the existence of a § 1985(3) civil rights conspiracy targeting him for the deprivation of these same rights. App. 73a-74a. Finally, Peloza asserted a state law civil rights claim under California's Tom Bane Civil Rights Act. App. 75a.

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[1] Peloza complained as well that the school district and certain individual Respondents reprimanded him and subjected him to unfounded public criticism, based on false statements, because he resisted their efforts to violate the Establishment Clause of the United States Constitution. App. 59a-60a. Peloza asserted injuries to several rights redressable under Title 42 U.S.C. §§ 1983 and 1985. App. 70a-72a, 72a-74a. The Respondents and others not identified at the time of the filing of the Complaint conspired to injure Peloza's reputation. App. 72a-74a. In the school newspaper and in the public press, Peloza was wrongly accused of teaching religion in his science classes. App. 66a-67a. A formal reprimand was issued against him by his school's principal. App. 67a-68a.

The district court dismissed Peloza's federal claims with prejudice. *Peloza v. Capistrano Unified School District*, 782 F. Supp. 1412 (C.D.Cal. 1992) (*Peloza* I), App. 1a. The dismissal was granted, putatively, because Petitioner failed to state a claim on which relief could be granted. App. 17a. The district court, however, failed to take as true the well-pled facts of the Complaint.[2] Instead, the Court accepted characterizations of the Complaint proffered by the Respondents and disposed of Petitioner's claims. *Id.*

Although ultimately it affirmed the judgment of the district court, the Ninth Circuit panel found that Peloza's complaint raised "important questions of first impression in this circuit," *Peloza* III, App 53a, and, the panel concluded, "[t]he school district's restriction on Peloza's ability to talkwith students about religion during the school day is a restriction onhis right to free speech," *Peloza* III, App. 48a. Nevertheless, the district court, ruling on the Rule 12(b)(6) motion, stated that the issue before him on the motion was, "*whether Peloza has a constitutional right to conduct himself as a loose cannon in his*

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[2] *Compare* Complaint ¶¶ 1, 54, 64, App. 59a, 71a, and 73a (Petitioner did not seek to indoctrinate students in the viewthat the world was the product of special creation; petitioner sought to teach his students to discriminate between philosophies and scientific theory) with *Peloza I*, App. 2a (describing the suit as an assertion of Petitioner'sright to "teach his students pursuant to his belief in the system of creationism, as expounded in Genesis").

classroom or on the campus and teach scientific theories of his own choosing despite the fact that they are not authorized by and are prohibited by the State Board of Education curriculum." App. 6a.[3]

Initially, the United States Court of Appeals forthe Ninth Circuit reversed in part the judgment of the district court, and remanded for further consideration at least one of Petitioner's § 1983 claims. *Peloza v. Capistrano Unified School District*, slip opinion, (July 25, 1995) (App. 18a) (*Peloza* II). Subsequently, the panel recalled the mandate, withdrew its initial decision, and entered a new judgment affirming the judgment of the district court. *See Peloza v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994) (App. 38) (*Peloza* III). Judge Poole concurred in part and dissented in part. App. 52a.

Although it affirmed the judgment below, the *per curiam* opinion recognized that Peloza had "present[ed] important questions of first impression in this circuit[,]" App 52a regarding his free speech rights; further, the panel expressed no doubt that "[t]he school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right to free speech." App. 47a.

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[3] In other words, the district court's ruling on the 12(b)(6) motion was founded on an improper (and incorrect) *factual conclusion*, not a legal pleading. Obviously, Peloza did not assert a right to act as a "loose cannon." His Complaint states that he was being compelled to indoctrinate students in a religious belief, contrary tothe proscription of the Establishment Clause, *see* Complaint ¶ 1, App. 59a ("Plaintiff is not seeking either 'balanced treatment' or 'equal time' in the classroom for the religious belief of creationism"), *id.* ("Plaintiff desires his classroom to be void of the imposition of any philosophical and religious belief systems"), *id.* ("forcing [Petitioner] to teach the religious belief system of evolutionism as a valid scientific theory would force him to become an unwilling agent of the school district in the establishment of the religion of secular humanism, in violation of the First Amendment to the United States Constitution"), and that he was placed under a rule of silence applicable only to one teacher in the employ of the school district: Peloza. Complaint ¶¶ 2-3, App. 60a.

The panel found Peloza's claim to be one "involv[ing] substantial questions and requir[ing] the balancing of rights of free speech against the Establishment Clause." App. 52a. This balancing, Petitioner had urged, did not support the Respondents' imposition of a rule of silence on only Peloza. But, the panel concluded, discussions of matters of religion "with students during school time on school grounds would violate the Establishment Clause of the First Amendment." App. 48a. Consequently, the panel held, "[t]he school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech." App. 47a.

Judge Poole sharply dissented from that portion of the per curiam which affirmed the dismissal of Peloza's freedom of speech claims. App. 52a. Noting the "procedural posture of the case," App. 53a, Judge Poole concluded that the Complaint contained sufficient, well-pled facts to take Peloza's free speech claims beyond a Rule 12(b)(6) dismissal, App. 56a.

The Establishment Clause issues were not lightly dismissed by the dissent. Rather, Judge Poole reasoned that, while school districts have legitimate interests in complying with the Establishment Clause, such legitimate interests would not support a complete ban on *all* discussions about religion by a teacher. App. 53a-54a. The school district's rule of silence, Judge Poole concluded, would censor discussion "during lunch . . . about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were." *Id.* The Complaint stated a claim on which relief could be granted, Judge Poole concluded, because it included an allegation that the school district had ordered Petitioner "'not to discuss any religious matters . . . during lunch, class breaks, and before and after school hours . . . .'" App. 55a (*quoting* Complaint ¶ 3, App. 61a).

A timely petition for rehearing, with suggestion of rehearing en banc, was denied by the United States Court of Appeals for the Ninth Circuit on November 25, 1994.

REASONS FOR GRANTING THE WRIT

In *Tinker*, this Court dismissed arguments that "either students *or teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506 (emphasis added). This Court's view summarized "the unmistakable holding of this Court for almost 50 years." *Id.* And in *Tinker*, this Court held that restrictions on freedom of speech or expression within the schoolhouse gates could not be justified by assertions of "undifferentiated fear or apprehension of disturbance . . . ." *Id.*, 393 U.S. at 508. This Court reasoned that, although "any variation from the majority's opinion may inspire fear[,]" *id.*, and even though "any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance[,]" *id.*, "our Constitution says we must take [the] risk," of "this sort of hazardous freedom . . . ." *Id.* Consequently, in *Tinker*, this Court concluded a student "may express his opinions, even on controversial subjects . . . if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.*, 393 U.S. at 513 (citation omitted).

Previously, in *Pickering*, this Court addressed the issues related to the right to freedom of speech of public school teachers. There, this Court used a two-prong analysis to determine whether the teacher's speech addressed a matter of public concern, *id.*, 391 U.S. at 572-73, and whether, in cases in which the speech did address issues of public concern, the teacher would have lost his job notwithstanding his speech, *id.* at 573-75.

Consequent to the decisions in *Tinker* and *Pickering*, courts of the United States have decided a striking variety of free speech claims raised by publicly employed teachers. *See infra* at 12 n.5, and at 13 (citing cases). These cases fall broadly into two categories: those in which the court relies on *Tinker*'s "material and substantial disruption" test, *see infra* at 13; and, those cases in which courts have relied on *Pickering*'s public employee speech formulation, *see infra* at 12 n.5.

This petition provides this Court with the opportunity to consider and resolve this fully developed conflict between the circuits.

Furthermore, the decision of the Ninth Circuit should be reviewed and reversed because the Ninth Circuit failed to follow this Court's teaching regarding governmental restrictions on speech which are content- or viewpoint-based, and on the dismissal of civil rights claims for failure to state a claim on which relief could be granted.

I. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, SECOND, SIXTH, SEVENTH, TENTH AND ELEVENTH CIRCUITS BY LIMITING WHAT A PUBLIC SCHOOL TEACHER MAY SAY WITHOUT ANY SHOWING OF THE "MATERIAL AND SUBSTANTIAL DISRUPTION" REQUIRED BY *TINKER*

Confronted with a civil rights claim in which the only pleading before the court established that the Respondents had issued a directive to Peloza, a publicly employed teacher, not to discuss certain topics with students (even outside of class-time), the district court should have looked to the "material and substantial disruption" standard to decide the constitutionality of the anti-speech directive. That standard is the one used by the United States Courts of Appeal for the First, Second, Sixth, Seventh, Tenth and Eleventh Circuits. *See infra* at 13. Instead, the district court explicitly invoked this Court's public employee speech formulation in concluding that Peloza's free speech claims should be dismissed under F. Civ. R. P. 12(b)(6). *Peloza* I, App. 12a-14a. And the divided panel of the Ninth Circuit implicitly applied that same doctrinal formulation to Peloza's claim *Peloza* III, App. 46a-48a. The Ninth Circuit's choice of the public employee speech doctrine is in harmony with the approach taken in the United States Courts of Appeal for the Third, Fourth, Fifth and Eighth Circuits, *see infra* at 12, n. 5, but in conflict with the approach taken in the First, Second, Sixth, Seventh, Tenth and Eleventh Circuits. *See infra* at 13 (citing cases).

The choice of doctrines, and the conflict between the circuits over which doctrine to apply in classroom and school settings, is significant.[4] As set forth herein, the Ninth Circuit's choice of doctrine made a difference in the outcome of this case since the only pleading before the district court and the Ninth Circuit panel provided no basis on which either court could have asserted that Peloza's speech would cause a "material and substantial disruption" of the school.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court held that governmental entities have an enhanced interest in regulating the speech of their employees when acting in the role of employer. *Id.* at 568. Nevertheless, even government employees were not to be regarded as relinquishing "the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Id.*

In *Pickering*, this Court tested a claimed violation of a government employee's free speech rights by use of a two-step analysis. First, this Court considered whether the employee's speech addressed a matter of public concern. *Id.* at 572-73. Concluding in that case that the speech addressed an issue of public concern, this Court held that the government had the burden of proving that the employee would have lost his job notwithstanding his speech. *Id.* at 573-75.

The United States Court of Appeals for the Ninth Circuit applied the analysis from *Pickering* to the speech rights of a publicly employed teacher in *Nicholson v. Board of Education*,

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[4] The choice between *Pickering* and *Tinker* in cases of teachers asserting free speech claims in classroom settings, and many of the lower court cases noted in this argument, have been discussed more fully in CLARICK, "Public School Teachers and the First Amendment: Protecting the Right to Teach," 63 N.Y.U.L.REV. 693 (June 1990).

682 F.2d 858 (9th Cir. 1982).[5] In *Nicholson*, the Ninth Circuit addressed a teacher's First Amendment claim arising out of school authorities' failure to rehire him after he refused to follow regulations regarding the pre-publication review of articles in the school newspaper, of which he was the faculty supervisor. 682 F.2d at 861-62. Applying *Pickering*, the Ninth Circuit weighed the school's interest in eliminating the combined effect of the teacher's speech and insubordinate conduct against the teacher's interest in free speech. 682 F.2d at 864-66. The Ninth Circuit concluded that the school's interest were sufficiently weighty to prevail over the teacher's claims. *Id.*

Here, the district court explicitly applied this Court's "public employee" speech doctrine. *See Peloza* I, App. 12a-14a. The district court relied on *Pickering*, App. 13a, and on *Pickering*'s progeny, *Rankin v. McPherson*, 483 U.S. 378 (1987). App. 12a. The Ninth Circuit affirmed the districtcourt's decision and did not upbraid the district court for its reliance on the *Pickering* line of cases. Albeit *sub silentio*, the panel applied the standard of analysis of *Pickering* and *Nicholson*, in concluding that, "[t]he school district's interest in avoiding an Establishment Clause violation *trumps* Peloza's right to free speech." App. 47a.

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[5] The Ninth Circuit is not alone in its application of *Pickering* to disputes involving the speech ofpublicly employed teachers. The United States Courts of Appeal for the Third Circuit, *see Bradley v. Pittsburgh Bd. of Education*, 910 F.2d 1066 (3d Cir. 1990) and *Sanguigni v. Pittsburgh Bd. of Education*, 968 F.2d 393 (3d Cir. 1992), the Fourth Circuit, *see Daniels v. Quinn*, 801 F.2d 687, 689(4th Cir. 1986), *Hall v. Marion School Dist.*, 31 F.3d 183 (4th Cir. 1994), *Kim v. Coppin State College*, 662 F.2d 1055 (4th Cir. 1981), and *Stroman v. Colleton County School Dist.*, 981 F.2d 152, 155-56 (4th Cir. 1992), the FifthCircuit, *see Dodds v. Childers*, 933 F.2d 271, 273-74 (5th Cir. 1991), *Kingsville Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980), *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273 (5th Cir. 1990) and *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794 (5th Cir. 1989) and the Eighth Circuit, *Raposa v. Meade School Dist.*, 790 F.2d 1349 (8th Cir. 1986), all apply *Pickering* analysis in such cases.

To the contrary of the rule applied below, and in cases in the Third, Fourth, Fifth, Eighth and Ninth Circuits, the United States Courts of Appeals for the First, Second, Sixth, Seventh, Tenth, and Eleventh Circuits apply the standards developed in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), to claims of injury to the free speech rights of publicly employed teachers.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court held that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, 393 U.S. at 506. Analyzing speech in the school context, this Court held that restrictions on speech in public schools are valid only where it is shown that the speech causes a substantial interference with the educational mission of the school. *Id.*, 393 U.S. at 509.

Contrary to the Ninth Circuit, the United States Courts of Appeal for the First Circuit, *see Keefe v. Geanakos*, 418 F.2d 359, 361-62 (1st Cir. 1969) and *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the Second Circuit, *see East Hartford Educ. Ass'n v. Bd. of Education*, 562 F.2d 838, 842-44 (2d Cir. 1977), *James v. Bd. of Education*, 461 F.2d 566, 571 (2d Cir. 1972), and *Russo v. Central School Dist.*, 469 F.2d 623, 633-34 (2d Cir. 1972), the Sixth Circuit, *see Minarcini v. Strongsville*, 541 F.2d 577 (6th Cir. 1976), and *Fowler v. Bd. of Education*, 819 F.2d 657, 662-63 (6th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987), the Seventh Circuit, *see Zykan v. Warsaw*, 631 F.2d 1300, 1304-06 (7th Cir. 1980), the Tenth Circuit, *see Miles v. Denver Public School*, 944 F.2d 773, 775-76 (10th Cir. 1991), and the Eleventh Circuit, *see Bishop v. Aronov*, 926 F.2d 1066, 1071, 1077 (11th Cir. 1991), all apply the "material and substantial disruption" test developed in this Court's decision in *Tinker* to cases of claimed injury to the free speech rights of publicly employed teachers.

The application of *Tinker* in the present case would, undoubtedly, have led to the conclusion that the directive not to answer students' questions about religion was unconstitutional. At this stage in the case, the courts below simply had no evidence before them from which they could have concluded that the Respondents could validly assert that Peloza's conversations with students were the cause of a "material and substantial disruption" of school order or discipline. See generally, Complaint, App. 58a.

Consequently, this Court should grant the petition for a writ of certiorari and resolve this fully developed conflict on the standard of review to be applied to claims of injury to the free speech rights of publicly employed teachers.

II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THIS COURT'S PRIOR DECISIONS ON CONTENT- AND VIEWPOINT-BASED DISCRIMINATION AND ON CONSTRUING FIRST AMENDMENT COMPLAINTS

A. The Ninth Circuit Applied An Incorrect Standard for Reviewing a Content- and Viewpoint-based Restriction on Speech

The directive not to answer student questions about religion, and not to discuss religion with students, is content- and viewpoint-based. The directive is obviously content-based because it looks to content in deciding whether speech may be uttered. *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972). As this Court has explained, regulations affecting speech are not content-neutral unless they are "'justified without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism, Inc.*, 491 U.S. 781, 791 (1989) (citation omitted). The Respondents, however, conditioned Peloza's right to freedom of speech precisely on the content of such speech; such conditioning, solely reflecting the Respondents' disagreement with the content of Peloza's speech, cannot pass constitutional muster. *See, e.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (striking city's hate-motivated crimes ordinance); *Boos v. Barry*, 485 U.S. 312 (1988) (striking statute which regulated protests that held foreign dignitariesup to public opprobrium).[6]

It is axiomatic that the right to freedom of speech is not subject to prevailing notions of taste. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("so long as the means are peaceful, the communication need not meet standards of acceptability"). Ideas can affect listeners (including students) and cause controversy. Consequently, this Court has required proof of substantial abuse before censoring controversial speech:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one group rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion on matters of public interest merely on the showing that others may thereby be persuaded to take action inconsistent with its interest. Abridgment of the liberty of such discussion can be justified only when a clear danger of substantive evils

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[6] The Respondents may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of hostility -- or favoritism -- towards the underlying message. *R.A.V.*, 112 S. Ct. at 2547-49.

> arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940).

The Respondents lack constitutional warrant to "protect" citizens (i.e., students) from "religious" speech: "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. . . . But these matters, often questions of accommodation of religion, are not before us." *Lee v. Weisman*, 120 L.Ed.2d 467, 488 (1992) (citation omitted); *cf. Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975) ("[b]ut when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the grounds that they are more offensive than others, the First Amendment strictly limits its power"). Plainly, a directive not to answer any students' inquiry regarding religion at anytime or any place during the school day and not to discuss matters of religion with students "has no place in this country. . . . [U]nity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion, through the fullest possible measure of freedom of conscience and thought." *Martin v. Struthers*, 319 U.S. 141, 150 (1943).

The "no answers to religion questions" ban fails the strict governing constitutional standards. When "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," *Carey*, 447 U.S. at 462, the law unconstitutionally censors. *Police Dep't*, 408 U.S. at 95-96 ("[t]he essence of this forbidden censorship is content control . . . . Selective exclusions . . . may not be based on content alone, and may not be justified by . . . content alone"); *accord Carey*, 447 U.S. at 462-63. A "content-based exclusion" is impermissible unless the government can "show that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (internal quotation marks and citation omitted).[7]

The Respondents' directive is raw censorship. The ban discriminates based on content of speech. Because the restriction on answering students' questions about religion applies only to Peloza, it appears that Peloza's *viewpoint* led to the decision to silence him. As a general principle, viewpoint discrimination by government actors is unconstitutional. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (and cases cited); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993). Indeed, viewpoint discrimination is so odious that, even in a *nonpublic* forum, such regulations always are unconstitutional. *Cornelius v. NAACP-LDEF, Inc.*, 473 U.S. 788, 806 (1985). Such viewpoint censorship is incompatible with the first amendment.

Whether analyzed as a content restriction or a viewpoint restriction, the directive was not necessary to further any compelling interest in avoiding a violation of the Establishment Clause of the United States Constitution. The Ninth Circuit erred in concluding that the directive suppressing Peloza's speech was necessary to prevent a violation of the Establishment Clause. The panel's application of *Lemon v. Kurtzman* is insupportable.

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[7] *Cf. R.A.V.*, (hate crimes statute that relies on impact of speech for imposition of criminal liability is unconstitutional); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987) (it is "incompatible with the First Amendment" to scrutinize content of speech to determine extent to which speech may be regulated); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383 (1984); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("[r]egulations which permit the government to discriminate on . . . content . . . cannot be tolerated").

The Ninth Circuit reasoned as follows:

> To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Peloza III, App. 48a. Principal among the flaws in the Ninth Circuit's reasoning is that the court focussed on the conjectured religious speech imputed to Peloza by the Respondents. The Ninth Circuit should have, instead, focussed on the governmental *policy* at issue. Choosing to focus on the religious element inevitably leads to invalidity. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("[t]he District Court plainly erred by focusing almost exclusively on the Creche"). But in other cases regarding religious speech, *e.g.*, *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Lamb's Chapel*, this Court has focussed on governmental *policy*, not the *particulars* of some challenged text or speech.

Contrary to the *Lemon* conclusion reached by the Ninth Circuit, Peloza's interaction with his students in an unencumbered academic environment passes constitutional muster. The primary purpose of academic freedom is secular: academic freedom serves the interest in fostering education and advancing learning. The primary effect, furthermore, would not be to advance Peloza's religion, but to foster the important federal and state constitutional and statutory rights that are implicated in open discussion. Finally, a policy which leaves Peloza free to decide whether to answer a student's questions about religion or not, free from concerns about the directive not to speak with students, does not entangle the school district in religion.[8] Peloza was not unconstitutionally entangled in religion merely because he discussed religion with inquiring students. In his dissent below, Judge Poole noted that the directive would bar serious discussion "during lunch . . . about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were." App. 53a-54a. Plainly, discussions of these matters are suppressed under the directive; just as plainly, these matters are readily capable of being discussed without hopelessly entangling the Respondents or Peloza in religion.

B. The Ninth Circuit Failed to Take as True the Well-pled Facts of the Complaint in this First Amendment Case

Even a cursory review of Peloza's federal civil rights and civil rights conspiracy complaint demonstrates thatthe motion for dismissal pursuant to Rule 12(b)(6) should not have been granted.

The gravamen of a civil rights claim under Title 42 U.S.C. § 1983 is the assertion of an injury to a right protected by the Constitution or laws of the United States caused by a person acting under color of state law. *See Parratt v. Taylor*, 451 U.S. 527, 535 (1981) ("the two essential elements to a § 1983 action are[:] (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States"). The factual and legal allegations necessary to assert a § 1983 claim are clearly set forth in the Complaint. Peloza allegedthat each of the Respondents acted under color of state law. Complaint ¶¶ 5-19, App. 60a-63a; Complaint ¶ 52, App. 70a-71a. Further, Peloza alleged that the conduct complained of injured him in the exercise of rights protected by the Constitution or laws of the United States. Complaint ¶¶ 1-3, App. 58a-60a; Complaint ¶¶ 52-55, App. 70a-72a; Complaint ¶ 68, App. 74a; ¶ 70, App. 75a.[9]

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[8] Obviously, in ruling on the appeal from a dismissal of a Complaint for failure to state a claim on which relief could be granted, the Ninth Circuit acted precipitously in concluding that an excessive entanglement would result from Peloza's responses to students' inquiries about religion. Peloza's Complaint simply provided no basis on which the Ninth Circuit could rest its conclusion. *Cf. Lynch*, 465 U.S. at 684 ("[e]ntanglement is a question of kind and degree").

The Ninth Circuit disobeyed this Court's instructions regarding disposition of claims on motion made under Fed. R. Civ. P. Rule 12(b)(6). In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), this Court addressed dismissals pursuant to Rule 12(b)(6) of claims arising from the Kent State University "incident." Following the shooting deaths on the campus of Kent State

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[9] The initial panel decision, *Peloza* II, App. 18a et seq., correctly identified a claim by Peloza of an Establishment Clause violation by the school district, and held that the district judge erred in resolving the claim contrary to facts alleged in the Complaint. App. 25a ("[p]ut another way, if the school district supported atheism as Peloza has alleged, it would violate the second prong of the Lemon test, which requires that a state policy 'neither advance[] *nor inhibit[]* religion.' *Lemon*, 403 U.S. at 612 (emphasis added)."). Essentially, the panel's first impression was right; the relevant factual questions could not be resolved contrary to the complaint on a motion to dismiss. Some of those factual questions are: (i) what did the school district require Peloza to teach; (ii) whether the instruction Pelozawas required to give involved atheism or inhibition of religion; (iii) what Peloza actually did teach, or what he actually wanted to teach, in place of the required instruction that, to his understanding, would violate the Establishment Clause of the United States Constitution.

University, personal representatives of the decedents' estates brought actions under § 1983 against the Governor of Ohio, the Adjutant General of Ohio, and various officers and enlisted personnel in the Ohio National Guard. 416 U.S. at 233.

The district court dismissed the suits on the grounds of Eleventh Amendment immunity. 416 U.S. at 234. The Sixth Circuit affirmed, although it noted the additional, alternative ground "that the common-law doctrine of executive immunity barred action against the state officials" who were respondents in that case. 416 U.S. at 234-35. This Court reversed, noting:

> When a federal court reviews the sufficiency of a complaint, before the reception ofany evidence either by affidavit or admissions, its task is necessarily a limited one. *The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.* Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

416 U.S. at 236 (emphasis added).

In *Scheuer*, this Court found "no present occasion for a definitive exploration of" the issues that led to dismissal in the trial court, "because of the absence of a factual record . . . ." 416 U.S. at 249. As in *Scheuer*, 416 U.S. at 250,

> [t]he documents properly before the [trial] court at this early pleading stage specifically placed in issue whether

> [the school district, its officers and employees] were acting within the scope of their duties under [state law]; whether [the Respondents] acted within the range of discretion permitted the holders of such [positions] . . . . Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

The Ninth Circuit should have reversed the district court's judgment and remanded for further proceedings. In fact, initially, the Ninth Circuit did so. App. 18a. The subsequent, sua sponte recall of the mandate and issuance of a new judgment by the per curiam panel reflects a fundamental misunderstanding of Rule 12(b)(6) practice. *Cf. Scheuer*, 416 U.S. at 236 ("'we follow . . . the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief") (citation omitted).

Consequently, the Ninth Circuit erred in granting a judgment affirming the district court's dismissal of Peloza's § 1983 claims.[10]

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[10] The Ninth Circuit affirmed the dismissal of Peloza's conspiracy claim under § 1985(3) because it concluded that, since his allegations regarding direct violations of his rights to free speech and due process were "insufficient to support a claim based on a violation of his constitutional rights of free speech and due process[,] his allegations of a conspiracy to violate these constitutional rights do not state a claim." App. 50a. Peloza does not abandon his § 1985(3) conspiracy claim here.

CONCLUSION

This Court is currently considering two cases which address applications of the Establishment Clause and the Freedom of Speech Clause. *Rosenberger v. Rector and Visitors of the University of Virginia*, Docket No. 94-329, *review granted*, 63 U.S.L.W. 6346 (Oct. 31, 1994) and *Capitol Square Review and Advisory Board v. Pinette*, Docket No. 94-780, *review granted*, 63 U.S.L.W. 3537 (Jan. 13, 1995). Because the instant Petition raises related issues of the balance to be struck between competing claims under the Freedom of Speech Clause and the Establishment Clause, this Court should hold this petition pending the outcomes in *Rosenberger* and *Pinette*. After the decisions in those cases are rendered, this Court should grant this petition, vacate the judgment of the Ninth Circuit below, and remand for further consideration in light of *Rosenberger* and *Pinette*. In the alternative, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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February 23, 1995.

APPENDIX TO THE PETITION

BEST AVAILABLE COPY

Respectfully submitted,

[illegible]

[illegible]

[Decided January 16, 1992]

JOHN E. PELOZA, Plaintiff,
v.
CAPISTRANO UNIFIED SCHOOL DISTRICT, et al.,
Defendants.
No. CV 91-5268-DWW (Bx).
United States District Court,
C.D. California.

Cyrus Zal, Fullerton, Cal., for plaintiff.

Rutan & Tucker by David C. Larsen, Costa Mesa, Cal., for defendants.

MEMORANDUM

DAVID W. WILLIAMS, Senior District Judge.

This memorandum revisits the long-standing debate between scientists and fundamentalists about human origins--the theories of evolution v. creationism. The Darwinian theory that humans are derived from lower life forms vs. the Christian concept in the opening Chapters of the Book of Genesis that (1) "In the beginning God created the heaven and the earth. (2) And the earth was without form, and void; and darkness was upon the face of the deep."

JURISDICTION

Plaintiff alleges violations of federal law, particularly the First, Fifth and Fourteenth Amendments to the United States Constitution and also 42 U.S.C. ss 1981, 1983, 1985(3), 28 U.S.C. § 1343 and the Doctrine of Pendent Jurisdiction.

FACTUAL BACKGROUND

John E. Peloza is a biology teacher in a public high school in the Capistrano Unified School District and he has brought this action for declaratory and injunctive relief and for damages arising out of his contention that he has the constitutional right to teach his students pursuant to his belief in the system of creationism, as expounded in Genesis. Adversely the school system contends that his biology classes should be taught pursuant to an accepted theory of evolution which is defined within the framework of the California Education Code. Pursuant to the code, each school district is required to establish local curriculum for grades 7 through 12. Such a curriculum must include the biological sciences as well as other standard subjects. The curriculum sets forth the subjects that must be covered in the high school biology class. The school district must maintain uniformity so that all students are adequately prepared for college entrance exams and higher education. In the biology curriculum, evolution is one of the main themes to be covered. It is taught throughout two years of science study in the district curriculum.

In his complaint, plaintiff contends that the school district's requirement that he teach the evolution theory is a violation of his constitutional rights because evolution is a religious theory. He cites the Establishment Clause of the First Amendment to the United States Constitution as forbidding "the establishment of a religion." It is his argument that the school district commands him to teach evolution as a fact rather than as a theory. Plaintiff takes the position that forcing him to teach the religious belief of evolution as a valid scientific theory would force him to become an unwilling agent of the school district in the establishment of the religion of secular humanism,[1] in violation of the First Amendment. Peloza claims a First Amendment right to freedom of speech and freedom to teach the truth in the classroom and to teach science.

Peloza further charges the defendants with conspiracy to deny his First, Fifth and Fourteenth Amendment rights and to destroy his professional reputation and career as a public high school teacher. He contends that the defendants, by reason of issuing letters of reprimand to him, are preparing to seek his dismissal as a public high school teacher. He does not claim that he has been dismissed and in fact he is still pursuing his career in this high school. Finally, he complains that even if he is not permitted to teach his theory of creationism in the classroom, he should be permitted to privately discuss religion and his theory of creationism in conversations with students during private, non-instructional time on the campus, during lunch, class breaks, and before and after school hours.

The party defendants include the Capistrano Unified School District and its Board of Trustees of the School District, and the Principal, Vice-Principal and certain teachers at the high school.

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[1] Plaintiff enclosed literature depicting creationism as the accurate explanation of the origin of life while debunking the doctrine of secular humanism. Secular humanism is the name many academics have tagged to the teaching that man is the center and each person controls his own destiny. Evolution is included among the subjects upon which secular humanism is based. Peloza argues that since a minority of Christians now recognize secular humanism as a religion, it follows that the doctrine of evolution is also a religion. However, evolutionism is the widely accepted scientific explanation of the origin of life. This is the explanation accepted by the nation's school districts in forming their curricula for the sciences. Defendant school district bases its biological science curriculum on the evolutionist theory.

CONTENTIONS OF DEFENDANTS

Defendants ask the Court to take judicial notice of lodged certified copies of the following:

1. The State of California Office of Curriculum Framework and Textbook Development's Instructional Materials and Framework Adoption: Policies and Procedures.

2. California Department of Education's Science Framework for California Public Schools Kindergarten Through Grade Twelve.

It is appropriate that such public documents be judicially noticed. Massachusetts v. Westcott, 431 U.S. 322, 97 S.Ct. 1755, 52 L.Ed.2d 349 (1977).

Defendants contend that the Capistrano Valley High School is part of the Capistrano Unified School District ("District") and that the District in turn is a creation of the legislature of the State of California, and is governed by the California Education Code. Cal.Educ.Code § 35000, et seq. That pursuant to the statutory scheme set forth in that Code, every school district is required to establish a local curriculum for grades 7 through 12. Cal.Educ.Code § 51054. That curriculum must include the biological sciences and must conform to minimum curriculum standards for California. Cal.Educ.Code § 51220(e).

The defendants further claim that the State Department of Education has the responsibility of developing a curriculum framework which is formulated by educators with expertise in the area of curriculum following public debate and input. Each local district has the responsibility of either implementing or modifying the state curriculum for its own particular needs (§ 51054).

CURRICULUM OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT

In this case, the curriculum framework for science was revised and approved by the State Board of Education in 1989 after a public hearing. The district follows this framework for its biology courses.

Within this framework, the principle of evolution is listed as one of the major themes of science. The framework states: "In order to teach life science, earth science or astronomy, evolution should be a fundamental, central concept of the curriculum." The defendants further contend that this concept of evolution as taught in the high school classes today is not the simple, traditional Darwinism theory of man's evolution from lower life forms, but encompasses changes in animal life, plants, geologic and astronomic processes. The defendants further claim that the framework notes that the question of "creation science" was "thoroughly studied by leading scientific societies, and rejected as not qualifying as a scientific explanation."

PLAINTIFF WOULD NOT TEACH THE PRESCRIBED CURRICULUM

The defendants further charge that Peloza chooses to ignore the accepted framework for biology classes and to insist upon using his own religious preference in teaching the theory of creationism to his students. Based upon this conflict, there has resulted considerable controversy between the teacher and the school officials resulting in the defendants causing a continuum of monitoring of plaintiff's classes in order to make a determination of the content of his lectures to students. This resulted in defendant

Thomas R. Anthony on February 7, 1991 issuing a formal written reprimand to plaintiff accusing him of teaching religion in the classroom. This reprimand incorporated in a letter dated October 11, 1990 from defendant Ross Velderraine to plaintiff. The 1991 letter from defendant Anthony issued a formal written warning to plaintiff in which it was stated:

> "You are hereby directed to refrain from any discussion of religion in any of your science classes and to refrain from attempting to influence your students to accept your own personal religious or philosophical beliefs. You are directed to follow the court outlines in the subject area of high school Biology and more specifically in the teaching of evolution. You are further directed to refrain from making any comments about Jesus Christ, about the fact that people who do not believe in Jesus Christ burn in hell, and to refrain from discussing religion or quoting from the Bible during any of your classes. If a student does ask you a question about religion, you are directed to refer them to their parents or to their own clergy person for guidance.
>
> You are further directed to teach evolution as a valid scientific theory and to refrain from any teaching of creationism as a valid scientific theory."

* * * * * *

At the outset it should be understood that my task in this memorandum is not to decide whether the teaching of evolution in the defendant's schools is or is not of itself a violation of the Establishment Clause in the First Amendment of the Constitution. No one has raised this as an issue in this case. The plaintiff in his argument has conceded that this might be a separate issue in another case. Simply put, the issue I must decide is whether Peloza has a constitutional right to conduct himself as a loose cannon in his classroom or on the campus and teach scientific theories of his own choosing despite the fact that they are not authorized by and are prohibited by the State Board of Education curriculum. I conclude that he has not.

In McLean v. Arkansas Bd. of Education, 529 F.Supp. 1255 (E.D.Ark.1982), the court held that teaching creationism is in fact teaching a religion. This undermines plaintiff's notion that he has a constitutional right to teach it because it is religion. It also debunks his idea that he can teach creationism as a part of academic freedom. In Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990), the court was faced with a teacher who sought to vary the curriculum by teaching creationism to his junior high school social studies students. In ruling that the school board sets the curriculum and that the plaintiff must follow it, the Webster court stated as follows:

> "There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.".... The First Amendment is "not a teacher license for uncontrolled expression at variance with established curricular content."

Id. at 1007, quoting from Palmer v. Board of Educ., 603 F.2d 1271, 1273-1274 (7th Cir.1979), cert. den. 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 659 (1980).

DISCUSSION

Plaintiff has stated in his complaint and opposition papers that he does not want to teach creationism. He claims that he only wants to teach science. The problem with his request is that there must be a foundation on which to build. The theory of evolution provides such a foundation. Plaintiff has not comported himself in the manner of one who only wants to teach science. In the classroom he has stated more than once that he is a creationist and does not believe in the theory of evolution. Additionally, plaintiff has had various conversations with members of his class espousing his Christian views.

I. SCHOOL DISTRICT HAS NOT VIOLATED PLAINTIFF'S FIRST AMENDMENT RIGHTS

A. Teachers do not have a Constitutional Right to Teach or not Teach Certain Subjects Based on their Personal Views

The California Education Code establishes that the state gives a broad outline of what should be covered in secondary education and the local districts take those guidelines and develop a curriculum that would best serve the needs of the pupils in their respective areas. Cal.Educ.Code § 51000 et. seq.

There is a compelling state interest for secondary school teachers to adhere to the curriculum set forth by the appropriate school district. Palmer v. Board of Ed. of City of Chicago, 603 F.2d 1271 (7th Cir.1979), cert. den. 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 659 (1980). Encompassed in that interest, teachers must adhere to the provided curriculum regardless of their own religious views and practices. Id. at 1274.

In Palmer the plaintiff, a probationary kindergarten teacher, was a member of the Jehovah's Witnesses religion. Before the beginning of classes the teacher informed the principal that because of her religious beliefs she would not be able to teach any subject that had to do with love of country, the flag or other patriotic matters. Id. at 1272. The court held that the teacher had no constitutional right to require students to submit to her views and to "forego a portion of their education they would otherwise be entitled to enjoy." Id. at 1274.

In Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004 (7th Cir.1990), the plaintiff was a social studies teacher in Illinois. A student of Mr. Webster complained that the plaintiff was teaching religion in his class. Plaintiff claimed that he was teaching non-evolutionary theories of creation, and that such theories do not violate the doctrine of separation of church and state. The district court held that plaintiff did not have a right to teach creation science in a public school. Id. at 1006. The lower court stated that a "school board generally has wide latitude in setting the curriculum, provided the school board remains within the boundaries established by the constitution." Id. The Seventh Circuit affirmed, holding that an individual teacher does not have the right to ignore the curriculum compiled by education authorities. Id. at 1008.

The Supreme Court has recognized that a secondary school teacher serves as a "role model for his students, exerting a subtle but important influence over theirperceptions and values." Ambach v. Norwick, 441 U.S. 68, 78-79, 99 S.Ct. 1589, 1595, 60 L.Ed.2d 49 (1979). Secondary school students are at a stage of development where they are open to many ideas. However, their intellectual development imposes more responsibility on the local school board to control the curriculum, choose the teachers and regulate their pedagogical methods. Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1304 (7th Cir.1980). "Students in such institutions are impressionable and their attendance is involuntary." Edwards v. Aguillard, 482 U.S. 578, 584, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987).

The rigid requirements set forth in the Cal.Educ.Code are to insure that high school students receive a well-balanced and thorough course of study. If every teacher chose to teach the areas he or she personally believed in and omitted those topics which are different from beliefs theyhold, a curriculum compiled by the state and the local district would be useless.

In Bishop v. Aronov, 926 F.2d 1066 (11th Cir.1991) cert. denied, granted sub nom., Bishop v. Delchamps, --- U.S. ----, 112 S.Ct. 294, 116 L.Ed.2d 238 (1991), the Eleventh Circuit stated that at the university level, those responsible for preparing the curriculum for public education have the right to prohibit a professor from including his religious viewpoints as part of his science curriculum. The court in Bishop refrained from reaching the Establishment Clause questions that were raised. The court stated that "by its effort to avoid endorsement of [plaintiff's] religious ideas in its classrooms" the university's reprimand of plaintiff espousing his religious ideas in the classroom "does not create an establishment of religion." Id. at 1078. The Bishop court held "that the University's restrictions with respect to classroom conduct issued under its authority to control curriculum do not infringe the free speech or free exercise rights of Dr. Bishop." Id. It is well known that institutions of higher education allow their instructors more latitude in choosing their subject matter. University students are more mature and are therefore better able to separate opinion from fact and infuse their own personal beliefs into a given framework. However, the Eleventh Circuit has stated that even on the university level the officials responsible for formulating the curriculum may control what a professor teaches without violating the professor's first amendment right to free speech.

B. Plaintiff's Claim that Evolution is a Religion is Unsupported

Plaintiff has stated that he will not teach evolution because it is a religion and therefore in violation of theestablishment clause of the first amendment.

"It is clearly established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching evolution does not violate the Establishment clause." McLean v.

Arkansas Bd. of Ed., 529 F.Supp. 1255, 1274 (E.D.Ark.1982). See Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); Willoughby v. Stever, No. 15574-75 (D.D.C. May 18, 1973); aff'd D.C.Cir.1974), cert. denied, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975); Wright v. Houston Indep. School Dist., 366 F.Supp. 1208 (S.D.Tex.1978), aff'd 486 F.2d 137 (5th Cir.1973), cert. denied, 417 U.S. 969, 94 S.Ct. 3173, 41 L.Ed.2d 1140 (1974). The Supreme Court has recognized that "the term 'religion' has reference to one's view of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." Davis v. Beason, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890), quoted in Wright at 1210, n. 5.

In Wright the court stated:

> Plaintiff's case depends in large measure upon their demonstrating a connection between "religion" as employed in the first amendment, and defendant's approach to the subject of evolution. The Court is convinced that the connection is too tenuous a thread on which to base a first amendment complaint.

Id. at 1210.

C. The Curriculum in Biology is not a Violation of the Establishment Clause

In the case at issue plaintiff states that following the curriculum would be a violation of the establishment clause. In Edwards, the Court stated that it has "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." Id. 482 U.S. at 583-84, 107 S.Ct. at 2577. "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." Id. at 584, 107 S.Ct. at 2577.

Since the evolutionist theory is not a religion, to require an instructor to teach this theory is not a violation of the Establishment Clause. Creationism is associated with "a particular interpretation of the Book of Genesis by a particular religious group." Epperson v. Arkansas, 393 U.S. 97, 103, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968). "The ideas of [creationism] are not merely similar to the literal interpretation of Genesis; they are identical and parallel to no other story of creation." McLean v. Arkansas Bd.of Education, 529 F.Supp. 1255, 1265 (E.D.Ark.1982). "The idea of sudden creation from nothing, or creation ex nihilo, is an inherently religious concept." Id. at 1266.

Evolution is a scientific theory based on the gathering and studying of data, and modification on new data. It is an established scientific theory which is used as the basis for many areas of science. As scientific methods advance and become more accurate, the scientific community will revise the accepted theory to a more accurate explanation of life's origins.

Plaintiff's assertions that the teaching of evolution would be a violation of the Establishment Clause is unfounded.

D. The School District has not Violated Plaintiff's Right to Free Speech

In Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), the Supreme Court examined the extent of a public employee's first amendment rightsto free speech. In Rankin, the Court used a balancing test to determine whether a public employee's speech is protected under the first amendment. The test used is "a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 384, 107 S.Ct. at 2896-97, quoting Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

In the case at issue the school district as the employer has a compelling interest to teach the students within the district the basic materials needed to become contributing citizens. Additionally, as the public employer, the school board does not want to infringe upon the religious beliefs held by individual students and their families. Because of the continuous controversy in the area of religion in schools, plaintiff's statements about evolution and his outward bias toward the creationist view and the Christian religion, may be identified as public concerns. While the school district is not attempting to chill plaintiff's speech, it does have a strong interest in maintaining its secular purpose of educating high school students. Under the framework set forth in Rankin, the interests and concerns of the school district overrule plaintiff's claimed right to free speech.

"In public education, individual's right tofree speech is not absolute. It may be limited if exercise of that right materially interferes with the rights of others." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). "The Supreme Court has never held that a teacher has a constitutional right to teach what he sees fit, not to pre-empt parents' decisions regarding what courses their children should take." Mercer v. Michigan State Bd. of Education, 379 F.Supp. 580, 586 (E.D.Mich.1974), aff'd mem., 419 U.S. 1081, 95 S.Ct. 673, 42 L.Ed.2d 678 (1974).

The plaintiff's right to free speech must be balanced "against his student's right to be free of religious influence or indoctrination in the classroom." Roberts v. Madigan, 702 F. Supp.

1505 (D.Colo.1989), aff'd 921 F.2d 1047 (10th Cir.1990). See Board of Education, Island Trees Union Free School District No. 26, et al. v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). Here, the balance seems to lie in the students' favor. The high school students at Capistrano High School have a right to be taught biology without the added comments and religious biases of plaintiff. As shown in defendants motion papers some students have already been effected by plaintiff's teachings. Parents have complained of frustration with the differences between the religious beliefs taught at home and the beliefs of the plaintiff.

Defendants have notified plaintiff that he is not to engage in discourse with students regarding his personal religious beliefs. If a student approaches him with a question about religion, plaintiff is correctly, instructed to refer the student to his or her parents or clergy. This instruction is not a violation of the plaintiff's first amendment right to free speech, but rather a directive to insure that religious dogma is not taught in the public school. Peloza seeks permission of this Court to speak privately to students on campus during lunch hours and class breaks so that he may preach to them his creativism views. He looks upon this as a First Amendment right. I don't see this as an instance of students clamoring to him as a Pied Piper to seek the blessings of his pronouncements. Rather it appears that he desires to do a job of proselytizing pupils in his classroom to swell the numbers of those who will follow him to his lecture during lunch hours or class breaks so he may expound his views to them out of the classroom and thus avoid the accusation of disseminating them while off the school payroll.

DEFERENCE

SCHOOL DISTRICT'S PROHIBITION OF PLAINTIFF DISCUSSING CHRISTIAN BELIEFS OUTSIDE OF THE CLASSROOM IS NOT A VIOLATION OF HIS CONSTITUTIONAL RIGHTS

States and School Boards are generally afforded considerable discretion in operating public schools. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986). Yet their discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. Board of Education v. Pico, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 435 (1982). See also Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); Jordan v. Gardner, 953 F.2d 1137 (9th Cir.1992); 47 Ohio State Law Journal 354 (1986).

Under the California Code an "instructional day" includes the hours before and after school, lunch and class breaks. 5 Cal.Code of Regulations § 5552; Cal.Educ.Code § 44807. See Johnson v. Huntington Beach Union High School District, 68 Cal.App.3d 1, 137 Cal.Rptr. 43 (1977). During these times a teacher is not permitted to discuss religious views with students. In the Equal Access Act, the United States Congress has determined that even though students may meet among themselves, teacher may not become involved in the student discussions. 20 U.S.C. § 4071(c). See Westside Community Schools v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990). I follow this precedent to conclude against plaintiff's right to go through the back door when the front door is closed to him. The district is correct in prohibiting plaintiff from having any religious discussions during the "hours of instruction."

II. PLAINTIFF CLAIMS DUE PROCESS VIOLATIONS VIA THE FIFTH AND THE FOURTEENTH AMENDMENTS

A. No Violation of any Property Interest

A complainant may allege that he has been deprived of a property right if he can prove that his legal rights or status have been removed or significantly altered. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). In the case at issue plaintiff has not lost a property right. He has received reprimands from his superiors but he has not lost his job. Plaintiff does not have a claim as to a loss of property rights.

B. Plaintiff has not Been Deprived of any Liberty Interest

In Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), the Court stated that if the state makes statements that seriously damage a person's standing and forecloses his opportunity to find other employment, adequate notice and a hearing may be necessary to clear one's name. However, statements which affect one's reputation or tortious defamation do not deprive one of a liberty interest. Hayes v. Phoenix-Talent School Dist., 893 F.2d 235 (9th Cir.1990).

As defendants point out, the statements made to plaintiff and the editorials in the paper were merely comments by various people within the school and District who disagree with plaintiff's teaching methods. Plaintiff has not established a deprivation of his liberty interest.

III. INDIVIDUAL DEFENDANTS SHOULD BE DISMISSED

Plaintiff has named a series of individual defendants who have made statements in opposition to plaintiff's teaching methods. These comments do not infringe on plaintiff's right toteach. In fact the individuals are only exercising their first amendment right to free speech. The reprimands received by plaintiff do not violate his constitutional rights.

IV. REMAINING CLAIMS TO BE DISMISSED

Once plaintiff's constitutional claims are dismissed, the remaining state causes of action should be dismissed for lack of jurisdiction.

CONCLUSION

Based on the discussion above, plaintiff's constitutional claims via 42 U.S.C. § 1983 and 42 U.S.C. § 1985 are dismissed on the grounds that plaintiff has not stated a claim for which relief can be granted. Defendants' motion is to be GRANTED.

[Argued and Submitted June 9, 1993.]
[Decided July 25, 1994.]
[Opinion Ordered Withdrawn Pending further
Order of Court Sept. 20, 1994.]

John E. PELOZA, Plaintiff-Appellant,
v.
CAPISTRANO UNIFIED SCHOOL DISTRICT; Board of Trustees of the Capistrano Unified School District; Paul B. Haseman; Crystal Kochendorfer; Marlene M. Draper; Annette B. Gude; Kathryn I. Itzel; E.G. Kopp; A. Edward Westberg; Jerome R. Thornsley; William D. Eller, Geraldine Jaffe; Thomas R. Anthony; Ross Velerraine; James Corbett; Paul Pflueger; Ray Panici; Tim Dunn; William Redding, Defendants-Appellees.

John E. PELOZA, Plaintiff-Appellant,
v.
CAPISTRANO UNIFIED SCHOOL DISTRICT; Board of Trustees of the Capistrano Unified School District; Paul B. Haseman; Crystal Kochendorfer; Marlene M. Draper; Annette B. Gude; Kathryn I. Itzel; E.G. Kopp; A. Edward Westberg; Jerome R. Thornsley, et al., Defendants-Appellees.

Nos. 92-55228, 92-55644.
United States Court of Appeals,
Ninth Circuit.

Cyrus Zal, Folsom, CA, for plaintiff-appellant.

David C. Larsen, Jeffrey Wertheimer, Rutan & Tucker, Costa Mesa, CA, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, POOLE and THOMPSON, Circuit Judges.

Opinion by Judge DAVID R. THOMPSON; Partial Concurrence and Partial Dissent by Judge POOLE.

DAVID R. THOMPSON, Circuit Judge:

John E. Peloza is a high school biology teacher. He sued the Capistrano Unified School District and various individuals connected with the school district under 42 U.S.C. § 1983. He alleges in his complaint that the school district requires him to teach "evolutionism" and that evolutionism is a religious belief system. He alleges this requirement violates his rights under the (1) Free Speech Clause of the First Amendment; (2) Establishment Clause of the First Amendment; (3) Due Process Clause of the Fourteenth Amendment; and (4) Equal Protection Clause of the Fourteenth Amendment[1]. He also alleges the defendants conspired to violate these constitutional rights and attempted by harassment and intimidation to force him to teach evolutionism. He alleges they did this because they have a class-based animus against practicing Christians, a class of which he is a member, in violation of 42 U.S.C. § 1985(3).

He also alleges state law claims forviolation of California's Tom Bane Civil Rights Act, Cal.Civ.Code § 52.1 (which provides a cause of action for interference with an individual's enjoyment of rights secured by the United States or California Constitution or by federal or state law), and for intentional infliction of emotional distress.

The district court 782 F. Supp. 1412 dismissed the federal claims for failure to state a claim upon which relief could be granted. Fed.R.Civ.P. 12(b)(6). The court then dismissed the state claims for lack of jurisdiction. The court also determined that the action was frivolous. Relying on Rule 11 of the Federal Rules of Civil Procedure and 42 U.S.C. § 1988, the court ordered Peloza and his attorney to pay approximately $32,000 to the defendants for their attorney fees and costs.

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[1] On appeal, Peloza abandoned his equal protection argument.

Peloza appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part and remand for further proceedings.

THE ALLEGATIONS OF THE COMPLAINT

The following summarizes the allegations of Peloza's complaint: Peloza is a biology teacher in a public high school, and is employed by the Capistrano Unified School District. He is being forced by the defendants (the school district, its trustees and individual teachers and others) to proselytize his students to a belief in "evolutionism" "under the guise of [its being] a valid scientific theory." Evolutionism is an historical, philosophical and religious belief system, but not a valid scientific theory. Evolutionism is one of "two world views on the subject of the origins of life and of the universe." The other is "creationism" which also is a "religious belief system." Peloza does not wish "to promote either philosophy or belief system in teaching his biology class." "The general acceptance of . . . evolutionism in academic circles does not qualify it or validate it as a scientific theory." Peloza believes that the defendants seek to dismiss him due to his refusal to teach evolutionism. His first amendment rights have been abridged by interference with his right "to teach his students to differentiate between a philosophical, religious belief system on the one hand and a true scientific theory on the other."

Peloza further alleges he has been forbidden to discuss religious matters with students the entire time that he is on the school campus even if a conversation is initiated by a student and the discussion is outside of class time.

He also alleges that the defendants have conspired to destroy and damage his professional reputation, career and position as a public school teacher. He has been reprimanded in writing for proselytizing students and teaching religion in the classroom. His inquiries as to whether he is being required to teach evolution as "fact" or "as the only valid scientific theory" have not been answered directly. He has not taught creationism in his classroom. He has been wrongly accused in the school newspaper and in the public press of teaching religion in his science class. He has been harassed by the defendant teachers and has received a formal written reprimand from defendant Thomas R. Anthony, the school principal, wrongly accusing him of proselytizing his students and teaching religion in the classroom, directing him to teach evolution as the only valid scientific theory, and forbidding him from teaching creationism as a valid scientific theory. Anthony further directed him not to discuss religion or attempt to convert students to Christianity while on campus. He has been criticized in a petition signed by faculty members for threatening litigation over the rights of faculty members to speak fully to the news media and each other.

STANDARDS OF REVIEW

We review do novo the grant of a Rule 12(b)(6) motion. Oscar v. University Students Co-operative Ass'n, 965 F.2d 783, 785 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992). We review the award of attorney fees for abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-61, 110 L.Ed.2d 359 (1990) (under Fed.R.Civ.P. 11); Benigni v. City of Hemet, 879 F.2d 473, 480 (9th Cir.1988) (under 42 U.S.C. § 1988).

DISCUSSION

I

The Section 1983 Claim

A. The Establishment Clause

To withstand an Establishment Clause challenge,[2] a state statute, policy or action (1) must have a secular purpose; (2) must, as its primary effect, neither advance nor inhibit religion; and (3) must not foster an excessive government entanglement with religions. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

Peloza's complaint alleges that the school district has violated the Establishment Clause "by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory." Complaint at 19-20. Evolutionism, according to Peloza, "postulates that the 'higher' life forms . . . evolved from the 'lower' life forms . . . and that life itself 'evolved' from non-living matter." Id. at 2. It is therefore "based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process." Id. Peloza claims that evolutionism is not a valid scientific theory because it is based on events which "occurred in the non-observable and non-recreatable past and hence are not subject to scientific observation." Id. at 3. Finally, in his appellate brief he alleges that the school district is requiring him to teach evolutionism not just as a theory, but rather as a fact.

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[2] The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion...." The Fourteenth Amendment incorporates the Establishment Clause's prohibitions against offending state action as well. Board of Education v. Pico, 457 U.S. 853, 864, 102 S.Ct. 2799, 2807, 73 L.Ed.2d 435 (1982).

Peloza's complaint is not entirely consistent. In some places he seems to advance the patently frivolous claim that it is unconstitutional for the school district to require him to teach, as a valid scientific theory, that higher life forms evolved from lower ones. At other times he claims the district is forcing him to teach evolution as fact. Were we to disregard Peloza's liberal use of "ism" and the adjectival phrase "a religious belief system,"[3] and to ignore his occasional use of "fact" instead of "valid scientific theory," we would not hesitate to hold his claim frivolous. On a motion to dismiss, however, we are required to read the complaint charitably, to take all well-pleaded facts as true, and to assume that all general allegations embrace whatever specific facts might be necessary to support them. Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990); Abramson v. Brownstein, 897 F.2d 389, 391 (9th Cir.1990).

Charitably read, Peloza's complaint possibly contains two Establishment Clause claims. The first is that the school district's actions establish a state-supported religion of evolutionism, or more generally of "secular humanism." See Complaint at 2-4, 20. According to Peloza's complaint, all persons must adhere to one of two religious belief systems concerning "the origins of life and of the universe:" evolutionism, or creationism. Id. at 2. Thus, the school district, in teaching evolutionism, is establishing a state-supported "religion."

We reject this claim because neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are "religions" for Establishment Clause purposes.

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[3] E.g., as in "the religious belief system of evolutionism," Complaint at 4, 18, 23, and "evolutionism, a religious belief system," id. at 19, 20, 22, 23.

Indeed, both the dictionary definition of religion[4] and the clear weight of the caselaw[5] are to the contrary. The Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not. Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (holding unconstitutional, under Establishment Clause, Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act"). Parsing Peloza's various formulations of his claims, however, we read them as possibly alleging a second claim, along the following lines: The school district forced Peloza to teach the belief that life and the universe came into existence without a creator, and to teach this belief as if it were undisputed fact rather than scientific theory.

Such actions would violate the Establishment Clause's mandate of "government neutrality between religion and religion, and between religion and non-religion." Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968) (emphasis added). "[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" Abington School Dist. v. Schempp, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963). Put another way, if the school district supported atheism as Peloza has alleged, it would violate the second prong of the Lemon test, which requires that a state policy "neither advance[] nor inhibit [ ] religion." Lemon, 403 U.S. at 612, 91 S.Ct. at 2111 (emphasis added).

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[4] According to Webster's, religion is the "belief in and reverence for a supernatural power accepted as the creator and governor of the universe." Webster's II New Riverside University Dictionary 993 (1988).

[5] See Smith v. Board of School Com'rs of Mobile County, 827 F.2d 684, 690-95 (11th Cir.1987) (refusing to adopt district court's holding that "secular humanism" is a religion for Establishment Clause purposes; deciding case on other grounds); United States v. Allen, 760 F.2d 447, 450-51 (2d Cir.1985) (quoting Tribe, American Constitutional Law 827-28 (1978), for the proposition that, while "religion" should be broadly interpreted for Free Exercise Clause purposes, "anything 'arguably non-religious' should not be considered religious in applying the establishment clause").

The district court dismissed this claim by findingthat the school district did not require Peloza to teachatheistic evolutionism as a fact, but rather simply required him to teach the scientific theory of evolution. In order to make this factual determination, the district court took notice of the school district's policy "Framework," as well as of a reprimand letter from Peloza's principal, Anthony. Neither the Framework nor the relevant part of Anthony's letter was included in the complaint. While we are not certain Peloza is correct that the district court erred in going outside the four corners of the complaint to consider these items,[6] we conclude that at the Rule 12(b)(6) stage it erred in relying on them to rebut Peloza's allegations to the contrary. Weighing competing factual claims, and finding that some claims are not supported, is simply not appropriate on a motion to dismiss; rather, the court must accept all of Peloza's well-pleaded factual allegations as true. Abramson, 897 F.2d at 391.

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6 Compare Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) ("[g]enerally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion") with Branch v. Tunnell, 14 F.3d 449 (9th Cir.1994), at 453 ("a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned"), and Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 (9th Cir.1988) (on motion to dismiss, court may take judicial notice of documents which are "a matter of general public record").

We conclude that the district court erred in granting the motion to dismiss Peloza's EstablishmentClause claim, and remand this cause of action for further proceedings. On remand, it would be appropriate for the district court to convert the school district's motion to dismiss into a motion for summary judgment. If it does so, it must give the parties notice and a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b). If it turns out that all the school district required was that Peloza teach evolution as scientific theory, no Establishment Clause violation occurred.[7]

B. Free Speech

Peloza alleges the school district ordered him to refrain from discussing his religious beliefs with students during "instructional time," and to tell any students who attempted to initiate such conversations with him to consult their parents or clergy. He claims the school district, in the following official reprimand, defined "instructional time" as any time the students are on campus, including lunch break and the time before, between, and after classes:

> You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are

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[7] The only viable claim we have found among the several claims asserted by Peloza would be very difficult to support factually. To defeat a motion for summary judgment, Peloza would have to establish issues of fact as to whether the school district ignored its own policies and required him to teach that life and the universe came into existence without a creator, and whether the school district required him to teach such ideas as fact rather than as scientific theory.

> required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day.

Complaint at 16. Peloza seeks a declaration that this definition of instructional time is too broad, and that he should be allowed to participate in student-initiated discussions of religious matters when he is not actually teaching class.[8]

The school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right of free speech. Nevertheless, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07, 89 S.Ct. 733, 736-37, 21 L.Ed.2d 731 (1969). "[T]he interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment...." Lamb's Chapel v. Center Moriches Union Free School Dist., --- U.S. ----, ----, 113 S.Ct. 2141, 2148, 124 L.Ed.2d 352 (1993) (quoting Widmar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 275, 70 L.Ed.2d 440 (1981)). This principle applies in this case. The school district's interest in avoiding an

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[8] The dissent claims this interpretation impermissibly narrows the scope of Peloza's complaint. However, the very sentence quoted by the dissent, Dissent at p. 8180, focuses not on the definition of "religious matters," but on the definition of "instructional time." We agree with the dissent that a complaint must be read charitably at the Rule 12(b)(6) stage. However, a reviewing court need not go so far as to invent claims not within the reasonable intendment of the complaint.

Establishment Clause violation trumpsPeloza's right to free speech.

While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). See Roberts v. Madigan, 921 F.2d 1047, 1056-58 (10th Cir.1990) (teacher could be prohibited from reading Bible during silent reading period, and from stocking two books on Christianity on shelves, because these things could leave students with the impression that Christianity was officially sanctioned), cert. denied, --- U.S. ----, 112 S.Ct. 3025, 120 L.Ed.2d 896 (1992).

The district court did not err in dismissing the part of Peloza's section 1983 claim that was predicated on an alleged violation of his right to free speech under the First Amendment.

C. Due Process

Peloza alleges that some of the defendants made defamatory statements to and about him, and that these statements damaged his reputation. He alleges this was state action which violated his right to due process under the Fourteenth Amendment.

To state a claim under 42 U.S.C. § 1983 based on an alleged violation of due process, Peloza must allege a deprivation of a life, liberty or property interest within the meaning of the Fourteenth Amendment's Due Process Clause. Board of Regents v. Roth, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972). The injury Peloza alleges here is to his reputation. An injury to reputation does not deprive Peloza of any interest in life. The district court concluded that it did not deprive him of a liberty or a property interest. Peloza concedes that his interest in his reputation is not a property interest. He argues, however, that the alleged injury to his reputation deprived him of a liberty interest sufficient to state a claim under section 1983 based on a due process violation. We disagree.

In Siegert v. Gilley, --- U.S. ----, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), the Court laid to rest the notion that reputation alone is a sufficient interest to give rise to due process rights. In that case, Siegert, a psychologist working for the federal government, resigned from his job in Washington, D.C. to avoid being fired. Id. at ----, 111 S.Ct. at 1791. He applied for a job in an Army hospital in Germany which required that he be "credentialed." This involved asking his former employer for information about him. Id. His former supervisor responded to the request for information with a letter which said "that he 'consider[ed] Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years [here].' " Id. The Court held that Siegert had no cause of action for deprivation of liberty under the Due Process Clause because "injury to reputation by itself was not a 'liberty' interest...." Id. at ----, 111 S.Ct. at 1794; see also Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976); Cooper v. Dupnik, 924 F.2d 1520, 1532 (9th Cir.1991), cert. denied, --- U.S. ----, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992); Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 17.4(d) (1992).

Like Dr. Siegert's, Peloza's allegations of injury to his reputation are insufficient to support a claim for deprivation of a liberty interest under section 1983. Peloza's citations to dicta in pre-Paul cases that suggest reputation alone is protected in this context are unavailing. The district court did not err in dismissing the part of Peloza's section 1983 claim which was predicated on an alleged violation of his right to due process under the Fourteenth Amendment.

II

The Section 1985(3) Claim

In support of his claim under 42 U.S.C. § 1985(3), Peloza alleges in his complaint that the defendants conspired to deprive him of equal protection of the laws under the Fourteenth Amendment; free speech under the First and Fourteenth Amendments; life, liberty "or" property without due process of law under the Fifth and Fourteenth Amendments; and the free exercise of his religious beliefs under the First and Fourteenth Amendments. In addition, he alleges the defendants violated his rights under the Establishment Clause of the First and Fourteenth Amendments. He alleges that the defendants engaged in this conspiracy pursuant to their class-based animus against practicing Christians.[9]

As we stated previously, Peloza's allegations are insufficient to support a claim based on a violation of his constitutional rights of free speech and due process. Accordingly, his allegations of a conspiracy to violate these constitutional rights do not state a claim. See Great American Fed. S. & L. Ass'n v. Novotny, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957

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[9] As with his equal protection claim under section 1983, Peloza appears to have dropped his equal protection claim from his appeal to this court.

(1979) ("Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."). Because Peloza failed to allege a conspiracy to do something that would violate his free speech or due process rights, his section 1985(3) claim predicated on a violation of these rights fails. We do not decide whether free speech and due process rights fall within the protection of section 1985(3).[10]

Because we remand for further proceedings on Peloza's section 1983 claim predicated on a violation of his constitutional rights under the Establishment Clause, and because the district court may resolve Peloza's case on summary judgment without reaching the freedom of religion issues of his section 1985(3) claim, we do not decide at this time whether Peloza's constitutional rights under the Establishment and Free Exercise Clauses fall within the protection of section 1985(3).[11]

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[10] See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 830, 103 S.Ct. 3352, 3357, 77 L.Ed.2d 1049 (1983) (free speech rights protected by section 1985 so long as the state is involved in the conspiracy alleged). As to due process rights, there appears to be some confusion within this circuit. Older cases have stated that section 1985(3) provides no remedy for violation of due process rights, Cohen v. Norris, 300 F.2d 24, 28 (9th Cir.1962) (dicta); Mitchell v. Greenough, 100 F.2d 184, 187 (9th Cir.1938) (holding), cert. denied, 306 U.S. 659, 59 S.Ct. 788, 83 L.Ed. 1056 (1939). In some more recent cases, we have allowed claims of due process violations to proceed under section 1985(3) without comment. See Judie v. Hamilton, 872 F.2d 919, 924 (9th Cir.1989); Padway v. Palches, 665 F.2d 965, 969 (9th Cir.1982).

[11] See Taylor v. Gilmartin, 686 F.2d 1346, 1358 (10th Cir.1982) (First Amendment freedom of religion protected by section 1985(3)), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994, and cert. denied, 463 U.S. 1229, 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); Action v. Gannon, 450 F.2d 1227, 1234 (8th Cir.1971) (same); Cooper v. Molko,

III

State Law Claims

Peloza's state law claims were pendent to his federal claims and were dismissed for lack of jurisdiction when the district court dismissed all the federal claims. Because we have reinstated Peloza's federal claim under 42 U.S.C. § 1983 insofar as it purports to allege a violation of Peloza's constitutional rights under the Establishment Clause, the district court will have jurisdiction once again to consider Peloza's state law claims.

IV

Attorney Fees

Peloza contends the district court erred in awarding the defendants costs and attorney fees of approximately $32,000. This award, made by the district court under Federal Rule of Civil Procedure 11 and 42 U.S.C. § 1988, was appropriate if Peloza's complaint is frivolous. Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422, 98 S.Ct. 694, 700-01, 54 L.Ed.2d 648 (1978) (under civil rights statutes); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir.1990) (en banc) (under Fed.R.Civ.P. 11). Peloza's complaint is not frivolous. The district court erred in dismissing it for failure to state a claim. Moreover, some of the issues he raises present important questions of first impression in this circuit. His free speech claim involves substantial questions and requires the balancing of rights of free speech against the Establishment Clause, a matter upon which the Supreme Court recently commented in Lamb's Chapel. Accordingly, we reverse the district court's award of attorney fees

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512 F.Supp. 563, 570 (N.D.Cal.1981) (same); but see Africa v. Anderson, 510 F.Supp. 28, 30 (E.D.Penn.1980) (freedom of religion not protected by section 1985(3)).

and costs to the defendants.

V
CONCLUSION

We reverse the district court's dismissal of Peloza's complaint for failure to state a claim under 42 U.S.C. § 1983. If Peloza is being required to teach religion as he alleges, rather than evolution as a scientific theory, his complaint is sufficient to survive a motion to dismiss. The district court on remand may choose to convert the motion to dismiss to one for summary judgment. If it determines that there is no genuine factual dispute as to whether Peloza was required to teach evolution as a scientific theory, summary judgment would be appropriate. In this event, the district court would not have to decide whether evolutionism as alleged by Peloza is a religion.

The district court correctly dismissed Peloza'ssection 1983 claim to the extent it is based on allegations of a violation of his constitutional rights to free speech and due process. He failed to allege sufficient facts to state a violation of these rights. The district court also correctly dismissed Peloza's claim under 42 U.S.C. § 1985(3) to the extent that claim is predicated on an alleged violation of Peloza's constitutional rights to free speech and due process, because he failed to allege facts sufficient to state a violation of those rights, assuming, without deciding, that they fall within the protection of section 1985(3). Because the district court may resolve Peloza's entire case on summary judgment, we do not decide at this time whether his allegations of a conspiracy to violate his constitutional rights under the Establishment and Free Exercise Clauses are sufficient to state a claim under 42 U.S.C. § 1985(3).

We reinstate Peloza's state law claims. We reverse the district court's award of attorney fees to the defendants. Finally, we reject Peloza's request that we reassign this cause to a district judge other than Judge Williams, who ruled on the motion to dismiss. Instead, we invite Judge Williams to consider for himself whether he should reassign this cause to another district judge. Any further appeals in this cause shall be calendared before the panel of Judges Fletcher, Poole and Thompson.

AFFIRMED in part, REVERSED in part, and REMANDED. Peloza shall recover from the appellees one-half his costs on appeal; the parties shall otherwise bear their own costs on appeal.

POOLE, Circuit Judge, concurring in part and dissenting in part:

I am in agreement with the majority's resolution of John Peloza's Establishment Clause and Due Process Clause claims. However, because I believe we can dismiss Peloza's free speech claims only by turning a deaf ear to the procedural posture of this case, I respectfully dissent from parts I.B and II of the majority opinion.

I

Schoolteacher John Peloza seeks a declaratory judgment permitting him to "respond[] to student-initiated inquiries ... regarding religion" during contract time. The majority opinion concludes that if Peloza's discussions would constitute an establishment of religion, the District may permissibly limit those discussions, even though such limitations restrict Peloza's free speech. With this I have no quarrel. But the majority's premise is that any discussions Peloza might have do constitute such an establishment, and I am unpersuaded that we may reach such a conclusion in the case's present posture. This is an appeal from the granting of a Rule 12(b)(6) motion. As such, we are not permitted to affirm dismissal of the complaint "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Love v. United States, 915 F.2d 1242, 1245 (9th Cir.1989). At this stage, we know almost nothing about what past or future discussions might involve. I can imagine a wide range of circumstances and questions "regarding religion" which Peloza could permissibly answer without violating the Establishment Clause. For example, a student might come to a teacher during lunch and ask about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were. Such questions would certainly be "regarding religion," student-initiated, and during contract time. As such, they fall within the class of discussions Peloza seeks to be permitted, yet it is hard to see how the descriptive role a teacher would have in responding to these questions would work any violation of the Establishment Clause.

The majority holding only makes sense if we presume that we know what kinds of questions are being asked and what kinds of answers Peloza would give. In the posture of this case, where we must reverse if there are any facts Peloza could conceivably prove which would entitle him to relief, this is a presumption we are forbidden from making. As a result, the majority holding means that any response to a student-initiated inquiry "regarding religion" during contract time, other than "Ask someone else," works a violation of the Establishment Clause. I cannot join in such a broad legal holding, and indeed the case law forbids it:

> In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application.... The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test.

> The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Lemon [v. Kurtzman], 403 U.S. [602, 614 [91 S.Ct. 2105, 2112, 29 L.Ed.2d 745] (1971)].

Lynch v. Donnelly, 465 U.S. 668, 678-79, 104 S.Ct. 1355, 1361-62, 79 L.Ed.2d 604 (1984).

Roberts v. Madigan, 921 F.2d 1047 (10th Cir.1990), upon which the majority relies, is not to the contrary. There, the court had before it a host of particulars: the conduct at issue involved a teacher displaying religious books and a poster reading "You have only to open your eyes to see the hand of God" in the classroom. Id. at 1049. That court also had the benefit of a district court factual determination that the conduct "created the appearance that [the teacher] was seeking to advance his religious views." Id. As this case stands, we know far less.

The majority impermissibly attempts to narrow the scope of Peloza's complaint by relying on a written warning from the school district which Peloza has incorporated into the complaint. The letter forbids Peloza from "attempt[ing] to convert students to Christianity or initiating conversations about your religious beliefs." Complaint at P 45. Were this all that the complaint said, I would have little trouble joining the majority. But the complaint alleges more; it contends that "the school district ... has directed Plaintiff not to discuss any religious matters during any of this 'instructional time,' including student-initiated conversations regarding religion during lunch, class breaks, and before and after school hours." Complaint at P 3. This allegation we must take as true. If all that lies behind it is the far narrower warning the majority cites, then Peloza's case will not be long for this world. But we may not presume that this is so.

I believe that, in a broad range of cases, the majority and

I could agree about what would or would not constitute a violation of the Establishment Clause. But the majority errs in presuming to know that what is at stake here is Peloza's right to "discuss[ ] his religious beliefs" with students. In doing so, it ignores the fact that this is a Rule 12(b)(6) case. More generally, it gives short shrift to the possibility that we may well be limiting free speech more broadly than the state's compelling interest in avoiding an establishment of religion would warrant.

II

I join in the majority's part II insofar as it dismisses Peloza's § 1985(3) due process claim based on his failure to properly allege a violation of his due process rights and remands his § 1985(3) claims based on Establishment Clause and free exercise rights. However, because I conclude that Peloza's free speech claim should not have been dismissed, I would also remand, rather than dismiss, his § 1985(3) claim based on alleged free speech violations.

III

Religion has been used to justify the suppression of speech for centuries. See Everson v. Board of Ed., 330 U.S. 1, 8-10, 67 S.Ct. 504, 508-09, 91 L.Ed. 711 (1947). With the development of a vigorous First Amendment jurisprudence, we have quelled some of the worst abuses. But points of tension remain. We must thus remain vigilant to ensure that in our rush to preserve certain fundamental rights, we do not trample others. Caution is of the essence; only through a methodical and fact-specific jurisprudence can we hope to achieve a proper accommodation.

For the reasons stated above, I respectfully dissent.

[Argued and Submitted June 9, 1993.]
[Filed July 25, 1994.]
[Opinion Withdrawn Sept. 20, 1994.]
[Decided Oct. 4, 1994.]

John E. PELOZA, Plaintiff-Appellant,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT; Board of Trustees of the Capistrano Unified School District; Paul B. Haseman; Crystal Kochendorfer; Marlene M. Draper; Annette B. Gude; Kathryn I. Itzel; E.G. Kopp; A. Edward Westberg; Jerome R. Thornsley; William D. Eller; Geraldine Jaffe; Thomas R. Anthony; Ross Velderraine; James Corbett; Paul Pflueger; Ray Panici; Tim Dunn; William Redding, Defendants-Appellees.

John E. PELOZA, Plaintiff-Appellant,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT; Board of Trustees of the Capistrano Unified School District; Paul B. Haseman; Crystal Kochendorfer; Marlene M. Draper; Annette B. Gude; Kathryn I. Itzel; E.G. Kopp; A. Edward Westberg; Jerome R. Thornsley, et al., Defendants-Appellees.

Nos. 92-55228, 92-55644.

United States Court of Appeals,
Ninth Circuit.

Cyrus Zal, Folsom, CA, for plaintiff-appellant.

David C. Larsen and Jeffrey Wertheimer, Rutan & Tucker, Costa Mesa, CA, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, POOLE and THOMPSON, Circuit Judges.

Per Curiam; Partial Concurrence and Partial Dissent by Judge POOLE.

PER CURIAM:

John E. Peloza is a high school biology teacher. He sued the Capistrano Unified School District and various individuals connected with the school district under 42 U.S.C. § 1983. He alleges in his complaint that the school district requires him to teach "evolutionism" and that evolutionism is a religious belief system. He alleges this requirement violates his rights under the (1) Free Speech Clause of the First Amendment; (2) Establishment Clause of the First Amendment; (3) Due Process Clause of the Fourteenth Amendment; and (4) Equal Protection Clause of the Fourteenth Amendment.[1]

He also alleges the defendants conspired to violate these constitutional rights and attempted by harassment and intimidation to force him to teach evolutionism. He alleges they did this because they have a class-based animus against practicing Christians, a class of which he is a member, in violation of 42 U.S.C. § 1985(3).

He also alleges state law claims forviolation of California's

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[1] On appeal, Peloza abandoned his equal protection argument.

Tom Bane Civil Rights Act, Cal.Civ.Code § 52.1 (which provides a cause of action for interference with an individual's enjoyment of rights secured by the United States or California Constitution or by federal or state law), and for intentional infliction of emotional distress.

The district court dismissed the federal claims for failure to state a claim upon which relief could be granted. Fed.R.Civ.P. 12(b)(6). The court then dismissed the state claims for lack of jurisdiction. The court also determined that the action was frivolous. Relying on Rule 11 of the Federal Rules of Civil Procedure and 18 U.S.C. § 1988, the court ordered Peloza and his attorney to pay approximately $32,000 to the defendants for their attorney fees and costs.

Peloza appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm, except as to attorneys' fees.

THE ALLEGATIONS OF THE COMPLAINT

The following summarizes the allegations of Peloza's complaint: Peloza is a biology teacher in a public high school, and is employed by the Capistrano Unified School District. He is being forced by the defendants (the school district, its trustees and individual teachers and others) to proselytize his students to a belief in "evolutionism" "under the guise of [its being] a valid scientific theory." Evolutionism is an historical, philosophical and religious belief system, but not a valid scientific theory. Evolutionism is one of "two world views on the subject of the origins of life and of the universe." The other is "creationism" which also is a "religious belief system." "The belief system of evolutionism is based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process. The world view and belief system of creationism is based on the assumption that a Creator created all life and the entire universe." Peloza does not wish "to promote either philosophy or belief system in teaching his biology class." "The general acceptance of ... evolutionism in academic circles does not qualify it or validate it as a scientific theory." Peloza believes that the defendants seek to dismiss him due to his refusal to teach evolutionism. His first amendment rights have been abridged by interference with his right "to teach his students to differentiate between a philosophical, religious belief system on the one hand and a true scientific theory on the other."

Peloza further alleges he has been forbidden to discuss religious matters with students the entire time that he is on the school campus even if a conversation is initiated by a student and the discussion is outside of class time.

He also alleges that the defendants have conspired to destroy and damage his professional reputation, career and position as a public school teacher. He has been reprimanded in writing for proselytizing students and teaching religion in the classroom. His inquiries as to whether he is being required to teach evolution as "fact" or "as the only valid scientific theory" have not been answered directly. He has not taught creationism in his classroom. He has been wrongly accused in the school newspaper and in the public press of teaching religion in his science class. He has been harassed by the defendant teachers and has received a formal written reprimand from defendant Thomas R. Anthony, the school principal, wrongly accusing him of proselytizing his students and teaching religion in the classroom, directing him to teach evolution as the only valid scientific theory, and forbidding him from teaching creationism as a valid scientific theory. Anthony further directed him not to discuss religion or attempt to convert students to Christianity while on campus. He has been criticized in a petition signed by faculty members for threatening litigation over the rights of faculty members to speak fully to the news media and each other.

STANDARDS OF REVIEW

We review do novo the grant of a Rule 12(b)(6) motion. Oscar v. University Students Co-operative Ass'n, 965 F.2d 783, 785 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992). We review the award of attorney fees for abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-61, 110 L.Ed.2d 359 (1990) (under Fed.R.Civ.P. 11); Benigni v. City of Hemet, 879 F.2d 473, 480 (9th Cir.1988) (under 42 U.S.C. § 1988).

DISCUSSION

I

The Section 1983 Claim

A. The Establishment Clause

To withstand an Establishment Clause challenge,[2] a state statute, policy or action (1) must have a secular purpose; (2) must, as its primary effect, neither advance nor inhibit religion; and (3) must not foster an excessive government entanglement with religions. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

Peloza's complaint alleges that the school district has violated the Establishment Clause "by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory." Complaint at 19-20. Evolutionism, according to Peloza, "postulates that the 'higher' life forms ... evolved from the 'lower' life forms ... and that life itself 'evolved' from non-living matter." Id. at 2. It is therefore "based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process." Id. Peloza claims that evolutionism is not a valid scientific theory because it is based on events which "occurred in the non-observable and non-recreatable past and hence are not subject to scientific observation." Id. at 3. Finally, in his appellate brief he alleges that the school district is requiring him to teach evolutionism not just as a theory, but rather as a fact.

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[2] The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion...." The Fourteenth Amendment incorporates the Establishment Clause's prohibitions against offending state action as well. Board of Education v. Pico, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806-07, 73 L.Ed.2d 435 (1982).

Peloza's complaint is not entirely consistent. In some places he seems to advance the patently frivolous claim that it is unconstitutional for the school district to require him to teach, as a valid scientific theory, that higher life forms evolved from lower ones. At other times he claims the district is forcing him to teach evolution as fact. Although possibly dogmatic or even wrong, such a requirement would not transgress the establishment clause if "evolution" simply means that higher life forms evolved from lower ones. Peloza uses the words "evolution" and "evolutionism" interchangeably in the complaint. This is not wrong or imprecise for, indeed, they are synonyms[3]. Adding "ism" does not change the meaning nor magically metamorphose "evolution" into a religion. "Evolution " and "evolutionism" define a biological concept: higher life forms evolve from lower ones. The concept has nothing to do with how the universe was created; it has nothing to do with whether or not there is a divine Creator (who did or did not create the universe or did or did not plan evolution as part of a divine scheme).

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[3] See Webster's Third New Int'l Dictionary (G. & C. Merriam Co. Springfield, MA. 1969), p. 789 ("evolutionism: 1: a theory of evolution (as in philosophy, biology, or sociology) -- see Darwinism 2: adherence to or belief in evolution esp. of living beings").

On a motion to dismiss we are required to read the complaint charitably, to take all well-pleaded facts as true, and to assume that all general allegations embrace whatever specific facts might be necessary to support them. Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990); Abramson v. Brownstein, 897 F.2d 389, 391 (9th Cir.1990).

Charitably read, Peloza's complaint at most makes this claim: the school district's actions establish a state-supported religion of evolutionism, or more generally of "secular humanism." See Complaint at 2-4, 20. According to Peloza's complaint, all persons must adhere to one of two religious belief systems concerning "the origins of life and of the universe:" evolutionism, or creationism. Id. at 2. Thus, the school district, in teaching evolutionism, is establishing a state-supported "religion."

We reject this claim because neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are "religions" for Establishment Clause purposes. Indeed, both the dictionary definition of religion[4] and the clear weight of the caselaw[5] are to the contrary. The Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not. Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (holding unconstitutional, under Establishment Clause, Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act").

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[4] According to Webster's, religion is the "belief in and reverence for a supernatural power accepted as the creator and governor of the universe." Webster's II New Riverside University Dictionary 993 (1988).

[5] See Smith v. Board of School Com'rs of Mobile County, 827 F.2d 684, 690-95 (11th Cir.1987) (refusing to adopt district court's holding that "secular humanism" is a religion for Establishment Clause purposes; deciding case on other grounds); United States v. Allen, 760 F.2d 447, 450-51 (2d Cir.1985) (quoting Tribe, American Constitutional Law

Peloza would have us accept his definition of "evolution" and "evolutionism" and impose his definition on the school district as its own, a definition that cannot be found in the dictionary, in the Supreme Court cases, or anywhere in the common understanding of the words. Only if we define "evolution" and "evolutionism" as does Peloza as a concept that embraces the belief that the universe came into existence without a Creator might he make out a claim. This we need not do. To say red is green or black is white does not make it so. Nor need we for the purposes of a 12(b)(6) motion accept a made-up definition of "evolution." Nowhere does Peloza point to anything that conceivably suggests that the school district accepts anything other than the common definition of "evolution" and "evolutionism." It simply required him as a biology teacher in the public schools of California to teach "evolution." Peloza nowhere says it required more.

The district court dismissed his claim, stating:

> Since the evolutionist theory is not a religion, to require an instructor to teach this theory is not a violation of the Establishment Clause.... Evolution is a scientific theory

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827-28 (1978), for the proposition that, while "religion" should be broadly interpreted for Free Exercise Clause purposes, "anything 'arguably non-religious' should not be considered religious in applying the establishment clause").

> based on the gathering and studying of data, and modification of new data. It is an established scientific theory which is used as the basis for many areas of science. As scientific methods advance and become more accurate, the scientific community will revise the accepted theory to a more accurate explanation of life's origins. Plaintiff's assertions that teaching of evolution would be a violation of the Establishment Clause is unfounded.

Id. at 12-13. We agree.

B. Free Speech

Peloza alleges the school district ordered him to refrain from discussing his religious beliefs with students during "instructional time," and to tell any students who attempted to initiate such conversations with him to consult their parents or clergy. He claims the school district, in the following official reprimand, defined "instructional time" as any time the students are on campus, including lunch break and the time before, between, and after classes:

> You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day.

Complaint at 16. Peloza seeks a declaration that this definition of instructional time is too broad, and that he should be allowed to participate in student-initiated discussions of religious matters when he is not actually teaching class.[6]

The school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right of free speech. Nevertheless, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969). "[T]he interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment...." Lamb's Chapel v. Center Moriches Union Free School Dist., --- U.S. ----, ----, 113 S.Ct. 2141, 2148, 124 L.Ed.2d 352 (1993) (quoting Widmar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 275, 70 L.Ed.2d 440 (1981)). This principle applies in this case. The school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech.

While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). See Roberts v. Madigan, 921 F.2d 1047, 1056- 58 (10th Cir.1990) (teacher could be prohibited from reading Bible during silent reading period, and from stocking two books on Christianity on shelves, because these things could leave students with the impression that Christianity was officially sanctioned), cert. denied, --- U.S. ----, 112 S.Ct. 3025, 120 L.Ed.2d 896 (1992).

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[6] The dissent claims this interpretation impermissibly narrows the scope of Peloza's complaint. However, the very sentence quoted by the dissent, Dissent at p. 12064, focuses not on the definition of "religious matters," but on the definition of "instructional time." We agree with the dissent that a complaint must be read charitably at the Rule 12(b)(6) stage. However, a reviewing court need not go so far as to invent claims not within the reasonable intendment of the complaint.

The district court did not err in dismissing the part of Peloza's section 1983 claim that was predicated on an alleged violation of his right to free speech under the First Amendment.

C. Due Process

Peloza alleges that some of the defendants made defamatory statements to and about him, and that these statements damaged his reputation. He alleges this was state action which violated his right to due process under the Fourteenth Amendment.

To state a claim under 42 U.S.C. § 1983 based on an alleged violation of due process, Peloza must allege a deprivation of a life, liberty or property interest within the meaning of the Fourteenth Amendment's Due Process Clause. Board of Regents v. Roth, 408 U.S. 564, 571, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548 (1972). The injury Peloza alleges here is to his reputation. An injury to reputation does not deprive Peloza of any interest in life. The district court concluded that it did not deprive him of a liberty or a property interest. Peloza concedes that his interest in his reputation is not a property interest. He argues, however, that the alleged injury to his reputation deprived him of a liberty interest sufficient to state a claim under section 1983 based on a due process violation. We disagree. In Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), the Court laid to rest the notion that reputation alone is a sufficient interest to give rise to due process rights. In that case, Siegert, a psychologist working for the federal government, resigned from his job in Washington, D.C. to avoid being fired. Id. at 227-29, 111 S.Ct. at 1791. He applied for a job in an Army hospital in Germany which required that he be "credentialed." This involved asking his former employer for information about him. Id. His former supervisor responded to the request for information with a letter which said "that he 'consider[ed] Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years [here].' " Id. The Court held that Siegert had no cause of action for deprivation of liberty under the Due Process Clause because "injury to reputation by itself was not a 'liberty' interest...." Id. at 233, 111 S.Ct. at 1794; see also Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1165-66, 47 L.Ed.2d 405 (1976); Cooper v. Dupnik, 924 F.2d 1520, 1532 (9th Cir.1991), cert. denied, --- U.S. ----, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992); Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 17.4(d) (1992).

Like Dr. Siegert's, Peloza's allegations of injury to his reputation are insufficient to support a claim for deprivation of a liberty interest under section 1983. Peloza's citations to dicta in pre-Paul cases that suggest reputation alone is protected in this context are unavailing. The district court did not err in dismissing the part of Peloza's section 1983 claim which was predicated on an alleged violation of his right to due process under the Fourteenth Amendment.

II

The Section 1985(3) Claim

In support of his claim under 42 U.S.C. § 1985(3), Peloza alleges in his complaint that the defendants conspired to deprive him of equal protection of the laws under the Fourteenth Amendment; free speech under the First and Fourteenth Amendments; life, liberty "or" property without due process of law under the Fifth and Fourteenth Amendments; and the free exercise of his religious beliefs under the First and Fourteenth Amendments. In addition, he alleges the defendants violated his rights under the Establishment Clause of the First and Fourteenth Amendments. He alleges that the defendants engaged in this conspiracy pursuant to their class-based animus against practicing Christians.[7]

As we stated previously, Peloza's allegations are insufficient to support a claim based on a violation of his constitutional rights of free speech and due process. Accordingly, his allegations of a conspiracy to violate these constitutional rights do not state a claim. See Great American Fed. S. & L. Ass'n v. Novotny, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957 (1979) ("Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."). Because Peloza failed to allege a conspiracy to do something that would violate his free speech or due process rights, or his rights under the Establishment Clause, his section 1985(3) claim predicated on a violation of these rights fails. We do not decide whether free speech, due process rights, or Establishment

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[7] As with his equal protection claim under section 1983, Peloza appears to have dropped his equal protection claim from his appeal to this court.

Clause rights, fall within the protection of section 1985(3).[8]

III
State Law Claims

Peloza's state law claims were pendent to his federal claims and were dismissed for lack of jurisdiction when the district court dismissed all the federal claims. We affirm their dismissal.

IV
Attorney Fees

Peloza contends the district court erred in awarding the defendants costs and attorney fees of approximately $32,000. This award, made by the district court under Federal Rule of Civil Procedure 11 and 42 U.S.C. § 1988, was appropriate if Peloza's complaint is frivolous. Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422, 98 S.Ct. 694, 700-01, 54 L.Ed.2d 648 (1978) (under civil rights statutes); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir.1990) (en banc) (under Fed.R.Civ.P. 11). Peloza's complaint is not entirely frivolous. Some of the issues he raises present important questions of first impression in this circuit. His free speech claim involves substantial questions and requires the balancing of rights of free speech against the Establishment Clause, a matter upon which the Supreme Court recently commented in Lamb's Chapel. Accordingly, we reverse the district court's award of attorney fees and costs to the defendants.

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[8] See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 830, 103 S.Ct. 3352, 3357, 77 L.Ed.2d 1049 (1983) (free speech rights protected by section 1985 so long as the state is involved in the conspiracy alleged). As to due process rights, there appears to be some confusion within this circuit. Older cases have stated that section 1985(3) provides no remedy for violation of due process rights, Cohen v. Norris, 300 F.2d 24, 28 (9th Cir.1962) (dicta); Mitchell v. Greenough, 100 F.2d 184, 187 (9th Cir.1938) (holding), cert. denied, 306 U.S. 659, 59 S.Ct. 788, 83 L.Ed. 1056 (1939). In some more recent cases, we have allowed claims of due process violations to proceed under section 1985(3) without comment. See Judie v. Hamilton, 872 F.2d 919, 924 (9th Cir.1989); Padway v. Palches, 665 F.2d 965, 969 (9th Cir.1982). See Taylor v. Gilmartin, 686 F.2d 1346, 1358 (10th Cir.1982) (First Amendment freedom of religion protected by section 1985(3)), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 and cert. denied, 463 U.S. 1229, 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); Action v. Gannon, 450 F.2d 1227, 1234 (8th Cir.1971) (same); Cooper v. Molko, 512 F.Supp. 563, 570 (N.D.Cal.1981) (same); but see Africa v. Anderson, 510 F.Supp. 28, 30 (E.D.Penn.1980) (freedom of religion not protected by section 1985(3)).

V

CONCLUSION

The district court correctly dismissed Peloza'ssection 1983 claim based on allegations of a violation of his constitutional rights under the Establishment Clause and his rights to free speech and due process. He failed to allege sufficient facts to state a violation of these rights. The district court also correctly dismissed Peloza's claim under 42 U.S.C. § 1985(3), because he failed to allege facts sufficient to state a violation of those rights, assuming, without deciding, that they fall within the protection of section 1985(3).

We affirm the dismissal of the complaint. We reverse the district court's award of attorney fees to the defendants.

The parties shall bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART.

POOLE, Circuit Judge, concurring in part and dissenting in part:

I am in agreement with the majority's resolution of John Peloza's Establishment Clause and Due Process Clause claims. However, because I believe we can dismiss Peloza's free speech claims only by turning a deaf ear to the procedural posture of this case, I respectfully dissent from parts I.B and II of the majority opinion.

I

Schoolteacher John Peloza seeks a declaratory judgment permitting him to "respond[] to student-initiated inquiries ... regarding religion" during contract time. The majority opinion concludes that if Peloza's discussions would constitute an establishment of religion, the District may permissibly limit those discussions, even though such limitations restrict Peloza's free speech. With this I have no quarrel. But the majority's premise is that any discussions Peloza might have do constitute such an establishment, and I am unpersuaded that we may reach such a conclusion in the case's present posture.

This is an appeal from the granting of a Rule 12(b)(6) motion. As such, we are not permitted to affirm dismissal of the complaint "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Love v. United States, 915 F.2d 1242, 1245 (9th Cir.1989). At this stage, we know almost nothing about what past or future discussions might involve. I can imagine a wide range of circumstances and questions "regarding religion" which Peloza could permissibly answer without violating the Establishment Clause. For example, a student might come to a teacher during lunch and ask about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were. Such questions would certainly be "regarding religion," student-initiated, and during contract time. As such, they fall within the class of discussions Peloza seeks to be permitted, yet it is hard to see how the descriptive role a teacher would have in responding to these questions would work any violation of the Establishment Clause.

The majority holding only makes sense if we presume that we know what kinds of questions are being asked and what kinds of answers Peloza would give. In the posture of this case, where we must reverse if there are any facts Peloza could conceivably prove which would entitle him to relief, this is a presumption we are forbidden from making. As a result, the majority holding means that any response to a student-initiated inquiry "regarding religion" during contract time, other than "Ask someone else," works a violation of the Establishment Clause. I cannot join in such a broad legal holding, and indeed the case law forbids it:

> In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application.... The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Lemon [v. Kurtzman], 403 U.S. [602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971)].

Lynch v. Donnelly, 465 U.S. 668, 678-79, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984).

Roberts v. Madigan, 921 F.2d 1047 (10th Cir.1990), upon which the majority relies, is not to the contrary. There, the court had before it a host of particulars: the conduct at issue involved a teacher displaying religious books and a poster reading "You have only to open your eyes to see the hand of God" in the classroom. Id. at 1049. That court also had the benefit of a district court factual determination that the conduct "created the appearance that [the teacher] was seeking to advance his religious views." Id. As this case stands, we know far less.

The majority impermissibly attempts to narrow the scope of Peloza's complaint by relying on a written warning from the school district which Peloza has incorporated into the complaint. The letter forbids Peloza from "attempt[ing] to convert students to Christianity or initiating conversations about your religious beliefs." Complaint at ¶ 45. Were this all that the complaint said, I would have little trouble joining the majority. But the complaint alleges more; it contends that "the school district ... has directed Plaintiff not to discuss any religious matters during any of this 'instructional time,' including student-initiated conversations regarding religion during lunch, class breaks, and before and after school hours." Complaint at P 3. This allegation we must take as true. If all that lies behind it is the far narrower warning the majority cites, then Peloza's case will not be long for this world. But we may not presume that this is so.

I believe that, in a broad range of cases, the majority and I could agree about what would or would not constitute a violation of the Establishment Clause. But the majority errs in presuming to know that what is at stake here is Peloza's right to "discuss[ ] his religious beliefs" with students. In doing so, it ignores the fact that this is a Rule 12(b)(6) case. More generally, it gives short shrift to the possibility that we may well be limiting free speech more broadly than the state's compelling interest in avoiding an establishment of religion would warrant.

II

I join in the majority's part II insofar as it dismisses Peloza's § 1985(3) due process and Establishment Clause claims based on his failure to properly allege a violation of these rights. However, because I conclude that Peloza's free speech claim should not have been dismissed, I would also remand, rather than dismiss, his § 1985(3) claim based on alleged free speech violations.

III

Religion has been used to justify the suppression of speech for centuries. See Everson v. Board of Ed., 330 U.S. 1, 8-10, 67 S.Ct. 504, 507-09, 91 L.Ed. 711 (1947). With the development of a vigorous First Amendment jurisprudence, we have quelled some of the worst abuses. But points of tension remain. We must thus remain vigilant to ensure that in our rush to preserve certain fundamental rights, we do not trample others. Caution is of the essence; only through a methodical and fact-specific jurisprudence can we hope to achieve a proper accommodation.

For the reasons stated above, I respectfully dissent.

[Decided Nov. 25, 1994.]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN E. PELOZA,) No. 92-55228
)
Plaintiff-Appellant,)
) D.C. No. CV-91-5268-DWW
v.)
)
CAPISTRANO UNIFIED) ORDER
SCHOOL DISTRICT, et al.)
)
Defendants-Appellees.)

Before: FLETCHER, POOLE and THOMPSON, Circuit Judges.

A majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Pool voted to grant rehearing before the panel.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[counsel names and addresses omitted]
[caption omitted]

PLAINTIFF'S COMPLAINT AND APPLICATION FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff JOHN E. PELOZA, by and through his attorney Cyrus Zal of The Rutherford Institute of California, complains of the Defendants and alleges as follows:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief and for damages, arising out of a controversy and dispute between Plaintiff, who is a biology teacher in a public high school, and the school district which employs him. The controversy and dispute arise from Plaintiff's method of teaching on the subject of the origins of life and of the universe. There are basically two world views on the subject of the origins of life and of the universe: the belief system of evolutionism is based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process. The world view and belief system of creationism is based on the assumption that a Creator created all life and entire universe. More particularly, the belief system of evolutionism, also known as macro-evolution, postulates that the "higher" life forms, such as human beings, evolved from the "lower" life forms, such as the one-celled amoeba and that life itself "evolved" from non-living matter. The belief system of creationism, on the other hand, postulates that none of the life forms evolved from any of the other life forms, but appeared abruptly as separate and distinct life forms and that there has never been any evolution of one life form into a distinctly different life form. Both evolutionism and creationism are religious belief systems in that the underlying assumptions or postulates that each belief is based upon occurred in the non-observable and non-

recreatable past and hence are not subject to scientific observation. Thus evolutionism, as well as creationism, both represent historical, philosophical, and religious belief systems, and neither one is a valid scientific theory. In this action, plaintiff is not seeking either "balanced treatment" or "equal time" in the classroom for the religious belief system of creationism. Plaintiff is seeking to be free from pressure from defendants, who are seeking to force plaintiff into the proselytizing of evolutionism upon his students under the guise of a valid scientific theory. Plaintiff desires his classroom to be void of the imposition of any philosophical and religious belief systems, including evolutionism and creationism, presented under the guise of science. Plaintiff seeks the freedom to teach his students to differentiate between a philosophical, religious belief system on the one hand and a true scientific theory on the other, and further seeks to teach his students the difference between indoctrination and education. The religious belief system of evolutionism and creationism clearly conflict with each other in their philosophies: Plaintiff desires not to promote either philosophy or belief system in teaching his biology class. Defendants are pressuring Plaintiff to present the religious belief system of evolutionism as a valid scientific theory: however, evolutionism cannot be directly observed or re-created in the laboratory in a scientific manner and hence it is not a valid scientific theory. Defendants cannot provide valid scientific evidence to support the religious belief system of evolutionism. Defendants are attempting to disguise the philosophical and religious belief system of evolutionism as a valid scientific theory and are pressuring Plaintiff to teach it as a valid scientific theory and Plaintiff is resistant to this attempt by Defendants to teach the religious belief system of evolutionism as a valid scientific theory. It is Plaintiff's position that forcing him to teach the religious belief system of evolutionism as a valid scientific theorywould force him to become an unwilling agent of the school district in the establishment of the religion of secular humanism, in violation of the First Amendment to the United States Constitution. The general acceptance of the religious belief system of evolutionism in academic circles does not qualify if or validate it as a valid scientific theory. Plaintiff seeks to vindicate, among other rights, his First Amendment rights to freedom of speech and to academic freedom to teach the truth in the classroom, and to teach science in the classroom, and the academic freedom rights of his students to be taught the truth.

2. Defendants have conspired to deny Plaintiff his First, Fifth and Fourteenth Amendment rights by engaging in actions designed to destroy and damage plaintiff's professional reputation, career, and position as a public high school teacher. Plaintiff believes that defendants seek to dismiss him from his position as a public high school teacher due to plaintiff's refusal to teach the religious belief system of evolutionism as a valid scientific theory. Plaintiff also believes that Defendants have engaged in conspiracy to deny him his First, Fifth and Fourteenth Amendment rights on the basis of his religious faithof Christianity.

3. Finally, the school district has defined "instructional time" as encompassing the entire time that plaintiff is on the school campus and has directed plaintiff not to discuss any religious matters during any of this "instructional time," including student-initiated conversations regarding religion during lunch, class breaks, and before the after school hours. Plaintiff seeks a declaration that under his First Amendment rights he is entitled to privately discuss religion in conversations initiated by students during private, non-instructional time on the school campus.

THE PARTIES

4. Plaintiff is a resident and citizen of the City of Dana Point, Orange County, California.

5. Defendant CAPISTRANO UNIFIED SCHOOL DISTRICT (hereinafter "Defendant SCHOOL DISTRICT") is an independent school district, organized and existing under the

Constitution and the laws of the State of California, for public secondary school purposes, and is managed, governed and controlled by Defendant BOARD OF TRUSTEES OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT (hereinafter "Defendant BOARD OF TRUSTEES").

6. Defendants PAUL B. HASEMAN, CRYSTAL KOCHENDORFER, MARLENE M. DRAPER, ANNETTE B. GUDE, KATHRYN I. ITZEL, E.G. KOPP, and A. EDWARD WESTBERG, are members of the Board of Trustees of Defendant SCHOOL DISTRICT. These named Defendants are all residents of Orange County, California, and are sued in their official capacities only.

7. Defendant JEROME R. THORNSLEY (hereinafter "Defendant THORNSLEY"), a resident of Orange County, California, was, at certain times relevant to the matters alleged in this complaint, the Superintendent of Defendant SCHOOL DISTRICT and is sued in his individual and official capacity.

8. Defendant WILLIAM D. ELLER (hereinafter "Defendant ELLER"), a resident of Orange County, California, is the Assistant Superintendent, Instructional Operations, of Defendant SCHOOL DISTRICT and is sued in his individual and official capacity.

9. Defendant GERALDINE JAFFE (hereinafter "Defendant JAFFE"), a resident of Orange County, California, is an attorney employed by the Orange County Department of Education and is sued in her individual and official capacity.

10. Defendant THOMAS R. ANTHONY (hereinafter "Defendant ANTHONY"), a resident of Orange County, California, is the Principal of Capistrano Valley High School and is sued in his individual and official capacity.

11. Defendant ROSS VELDERRAINE (hereinafter "Defendant VELDERRAINE") a resident of Orange County, California, is the Vice Principal of Capistrano Valley High School and is sued in his individual and official capacity.

12. Defendant JAMES CORBETT (hereinafter

"Defendant CORBETT") a resident of Orange County, California, is a teacher at Capistrano Valley High School and is sued in his individual and official capacity.

13. Defendant PAUL PFLUEGER (hereinafter "Defendant PFLUEGER") a resident of Orange County, California, is a teacher at Capistrano Valley High School and is sued in his individual and official capacity.

14. Defendant RAY PANICI (hereinafter "Defendant PANICI") a resident of Orange County, California, is a teacher at Capistrano Valley High School and is sued in his individual and official capacity.

15. Defendant TIM DUNN (hereinafter "Defendant DUNN") a resident of Orange County, California, is a teacher at Dana Hills High School and is sued in his individual and official capacity.

16. Defendant WILLIAM REDDING (hereinafter "Defendant REDDING") a resident of Orange County, California, is a teacher at Capistrano Valley High School and is sued in his individual and official capacity.

17. Plaintiff is informed and believes and thereupon alleges that at all times mentioned herein, except where alleged to the contrary, Defendants, and each of them, were acting for and on behalf of the other Defendants as their agents, servants, representatives and/or employees and all acts, conduct, and omissions herein alleged were perpetrated while said Defendants were acting within the authorized course and scope of said agency or employer.

18. Plaintiff is informed and believes and thereupon alleges that at all times mentioned herein, except where alleged to the contrary, Defendants, and each of them, were the agents, servants, representatives and/or employees of the remaining Defendants and were at all times material hereto acting within the authorized course, scope of and purpose of said agency and employer and/or that all of said acts were subsequently ratified by the respective principals and benefits thereof accepted by said

principals.

19. Plaintiff is ignorant of the true names and capacities of Defendants DOES 1 through 200, inclusive, and therefore sues said Defendants by such fictitious names. Plaintiff will seek leave of the court to amend this complaint to include the true names and capacities of said Defendants when they have been ascertained. Plaintiff is informed and believes and thereon alleges that each of the Defendants fictitiously named herein as DOE is legally responsible, negligently or in some other actual manner, for the events and happenings hereinafter referred to and thereby proximately caused the injuries and damages to the Plaintiff as hereinafter alleged.

20. Whenever the term "DEFENDANTS" is used, it includes all named Defendants and all DOES.

JURISDICTION AND VENUE

21. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. Section 1331 in that Plaintiff alleges violations of Federal law, particularly the First, Fifth, and Fourteenth Amendments to the United States Constitution. In addition, jurisdiction is proper under42 U.S.C. Section 1981, 1983, 1985(3), 28 U.S.C. Section 1343 and the doctrine of pendent jurisdiction. Declaratory relief is authorized by 28 U.S.C. Sections 2201 and 2202 and Rule 57, Federal Rules of Civil Procedure.

22. Venue in this District is proper under 28 U.S.C. Section 1391(b) because the claims arise here.

FACTS COMMON TO ALL CAUSES OF ACTION

23. Plaintiff hereby realleges paragraphs 1 through 22 and incorporates them herein as though set forth in full.

24. Within one year after sustaining the damages hereinafter alleged, the Plaintiff presented a written claim to Defendant SCHOOL DISTRICT pursuant to Government Code

Section 910 *et. seq.*

25. After the claim was filed but less than 6 months prior to the filing of the lawsuit, Defendant SCHOOL DISTRICT rejected the Plaintiff's claim in its entirely.

26. On or about February 7, 1991, Defendant ANTHONY issued a formal written reprimand to Plaintiff, wrongly accusing Plaintiff of proselytizing students in the classroom and wrongly accusing Plaintiff of teaching religion in the classroom. The formal written reprimand incorporated a letterdated October 11, 1990, from Defendant VELDERRAINE to Plaintiff. The entire contents of the February 7, 1991 written reprimand and the October 11, 1990 letter from Defendant VELDERRAINE to Plaintiff are incorporated herein as giving rise to Plaintiff's cause of action as stated below.

27. On or about February 12, 1991, Defendant ANTHONY wrote a letter to Plaintiff in response to Plaintiff's inquiry to Defendant ANTHONY regarding whether or not Defendant SCHOOL DISTRICT was directing Plaintiff to teach evolution as "fact." Defendant ANTHONY failed and refused to give a direct answer to Plaintiff's said inquiry.

28. On or about February 13, 1991, or February 14, 1991, Plaintiff wrote a letter to Defendant ANTHONY requesting written clarification regarding whether Defendant SCHOOL DISTRICT was directing Plaintiff to teach evolution as the only valid scientific theory. On or about February 19, 1991, Defendant ANTHONY, in response to Plaintiff's inquiry, failed and refused to give a direct and valid response to Plaintiff's said inquiry.

29. On or about February 25, 1991, Defendant ANTHONY wrote a memorandum to Plaintiff regarding the use of school letterhead and teacher's mailboxes. The Memorandum stated that "past practice has been that all materials distributed must either be approved by school administration or District administration. Also, the use of school letterhead is inappropriate unless you have my permission." Plaintiff is informed and believes, and thereupon alleges, that other teachers have been allowed to

distribute materials in the teachers' mailboxes without prior school administration or District administration approval and that other teachers have used the school letterhead without the permission of Defendant ANTHONY.

30. On various dates beginning on or about February 7, 1991, and including March 11, 1991, and continuing on various dates after that, Defendant ANTHONY spoke in person and by telephone to various individuals, including CATHY BERGESON, regarding Plaintiff. Defendant ANTHONY spoke to CATHY BERGESON on March 11, 1991, regarding Plaintiff. Defendant ANTHONY made statements to these individuals, including CATHY BERGESON, which are summarized and paraphrased as follows: "Creation should not be taught in a Biology class. The issue is not Creation but a personnel problem with Plaintiffthat has existed for years, involving the way Plaintiff has been conducting himself during school hours. An incident had occurred in the classroom between Plaintiff and a student. It was not a sexual encounter but details cannot be revealed because it is a personnel problem." Plaintiff denies that he has ever taught religion creationism in his class.

31. On or about March 15, 1991, Defendant ANTHONY wrote a Memorandum to Plaintiff regarding Plaintiff's informal grievance of alleged violations of the Collective Bargaining Agreement existing between Plaintiff's Union and Defendant SCHOOL DISTRICT. In the Memorandum dated March 15, 1991, from Defendant ANTHONY to Plaintiff, Defendant ANTHONY wrongly asserted that the Collective Bargaining Agreement had not been violated by Defendant SCHOOL DISTRICT in the issuing of the formal written reprimand to Plaintiff dated February 7, 1991.

32. On or about March 15, 1991, Defendant ANTHONY wrote a Memorandum to Plaintiff regarding Plaintiff's inquiries he had made of Defendant ANTHONY on March 15, 1991. The Memorandum of Defendant ANTHONY dated March 15, 1991, was a complete stonewall of questions that Plaintiff had

asked Defendant ANTHONY and Defendant ANTHONY purported not to know what terms such as "outside instructional time," or "origins," or "macro-evolution" meant. The entire content of Defendant ANTHONY's Memorandum to Plaintiff dated March 15, 1991, are incorporated herein.

33. On or about April 10, 1991, Defendant ANTHONY stated to Mr. Schmitch that he very much wanted Plaintiff to lose his job.

34. On or about April 10, 1991, Defendant PFLUEGER, who is a teacher at Capistrano Valley High School, gave the following question as a test to his students: "Why is Mr. Peloza's [the Plaintiff] reasoning that his First Amendment freedom of speech is being taken away off base?" The students were required by Defendant PFLUEGER to write an answer during class time and in the classroom.

35. On or about February 16, 1991, a story was published in the Orange County Register, a newspaper of general circulation, in which Defendant ANTHONY was stated to be the source of the following information: 1) that Plaintiff had been reprimanded and advised to teach according to school district guidelines; 2) that the school district was continuing to monitor Plaintiff, partly to build a case for apossible dismissal hearing; and 3) that it was not Plaintiff's right to not teach what he was employed to teach in the school district.

36. In the above-referenced February 16, 1991 news story, Defendant PANICI a teacher at Capistrano Valley High School, was stated to be the source of the following information: 1) that Plaintiff was hurting his students; and 2) that Plaintiff's teaching in the evolution unit did not belong in the classroom.

37. In the above-referenced February 16, 1991 news story, Defendant DUNN, a teacher at Dana Hills High School, was stated to be the source of the following information: that Plaintiff was out to discredit evolution theory in order to support creationism.

38. On or about March 7, 1991, a story was published

in the Orange County Register, in which Defendant THORNSLEY was stated to be the source of the following information: 1) that Plaintiff was being investigated for teaching "creationism;" 2) that Plaintiff was being investigated fortrying to convert non-Christians to Christianity; and 3) that Plaintiff had been reprimanded and eventually could face dismissal if he did not adjust his teaching.

39. On or about March 15, 1991, an article entitled "Opinion: Religion Dominates Science in Peloza's Classroom" was published in Paw Prints, the Capistrano Valley High School newspaper. Defendant CORBETT is the faculty advisor for Paw Prints. The article wrongly accused Plaintiff of teaching religion in his science class.

40. On or about April 2, 1991, a story was published in the Los Angeles Times, Orange County Edition, a newspaper of general circulation, in which Defendant ELLER, the assistant superintendent for instructional operations, was stated to be the source of the following information: 1) that if a teacher [referring to Plaintiff] constantly refutes evolution while referring to an alternative religious perspective, then that is clearly a violation of the state framework and clearly inappropriate, because of the First Amendment's requirement that church and state be separated; and 2) that Plaintiff's theories do not meet scientific standards.

41. In the above-referenced story of April 2, 1991, Defendant JAFFE, an attorney for the Orange County Department of Education, was stated to be the source of the following information: 1) that despite Plaintiff's denials, he was teaching creationism; 2) that creationism is not a scientific theory, it is a religious belief; and 3) that it is inappropriate to teach religion in a science class.

42. On or about May 13, 1991, Defendant ANTHONY issued a formal written reprimand to Plaintiff, wrongly accusing Plaintiff of proselytizing students in the classroom and wrongly accusing Plaintiff of teaching religion in the classroom. The written reprimand also directed Plaintiff as follows: "If a student does ask you a question about religion, you are directed to refer

them to their parents or to their own clergy person for guidance." The written reprimand also stated:

> "You are further directed to teach evolution as a valid scientific theory and to refrain from any teaching of creationism as a valid scientific theory . . . your refusal to teach evolution can be construed to constitute persistent failure to obey local and state [sic]

43. On or about May 13, 1991, Defendant ANTHONY issued a formal written warning to Plaintiff, in which it was stated:

> "You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day. Please be advised that should you fail to comply with these written directives or should there be any additional incidents of this kind, further disciplinary action will be considered."

44. On or about May 23, 1991, Plaintiff was in the teacher's lounge. On that date, Defendant CORBETT dropped a piece of paper on the table and commented to Plaintiff: "Congratulations on receiving your M.S. in biology." Defendant CORBETT then walked away.

45. Also on or about May 23, 1991, Defendant REDDING, in the presence of Plaintiff's students as they were entering Plaintiff's class, made the following remarks to Plaintiff: "John, I consider this offensive when you say you have an M.S. in biology and you do not. John, you are dishonest." Defendant REDDING was holding out a piece of paper while making these remarks to Plaintiff. The piece of paper was an event program which had mistakenly stated that Plaintiff had an M.S. in biology. At the event in question, an announcement was made to the audience that the program had mistakenly listed Plaintiff's master's

degree to be in biology rather than in physical education. Both Defendant CORBETT and Defendant REDDING were aware that an announcement had been made correcting the mistake in the program at the time the above-described incidents took place.

46. Also on or before May 23, 1991, Defendant REDDING wrongly harassed Plaintiff in the teacher's lounge regarding the event program which had mistakenly stated that Plaintiff had an M.S. in biology.

47. On various dates in 1991, Defendant PFLUEGER, a teacher at Capistrano Valley High School, has continually criticized Plaintiff to his students and has proselytized his students against Plaintiff in the classroom regarding the matters which are the subject of this action. Defendant PFLUEGER has encouraged his students to write letters to newspapers criticizing Plaintiff and has offered his students extra credit for having their letters of criticism regarding Plaintiff published in the Los Angeles Times, a newspaper of general circulation.

48. On or about May of 1991, Plaintiff received an evaluation report from the Capistrano Unified School District for the report period of 1990 to 1991. The evaluation report was unsigned and undated. The evaluation report contained "needs improvement" and "unsatisfactory" evaluations of Plaintiff that were not substantiated by any first-hand evidence but were based on Defendants' desire to pressure Plaintiff into teaching the religious belief systems of evolutionism as a valid scientific theory. The evaluation report is also evidence of discrimination against Plaintiff based on his religion of Christianity.

49. On or about June 14, 1991, an article entitled "Editorial: Show Cougar Courage" was published in Paw Prints, the Capistrano Valley High School newspaper. Defendant CORBETT is the faculty advisor for Paw Prints. The editorial represented an attempt and an invitation by Defendants to enlist the entire student body in the conspiracy to destroy and damage Plaintiff's professional reputation, career, and position as a teacher.

50. On or about June 13, 1991, and other dates in 1991,

Defendant PANICI, a teacher at Capistrano Valley High School, circulated a petition among faculty members at Capistrano Valley High School for them to sign, which stated:

> WE, the undersigned faculty members, find the intimidation tactics employed by Mr. Peloza and his attorney(s) to be repugnant and deleterious to the atmosphere of educational freedom at Capistrano Valley High School.
>
> WE strongly oppose the threat of litigation over the rights of faculty members to speak freely to the news media and each other.
>
> WE strongly support the rights of Mr. Peloza and all faculty members to espouse their opinions in all forums of discussion outside of the classroom.
>
> WE equivocally support our fellow faculty member's, named in the claim filed against the district, right to free speech outside of the classroom. Theynor any of us should become potential victims in a law suit [sic] by exercising their inalienable rights."

FIRST CAUSE OF ACTION

(Violation of Federal Rights Under Section 1983
Title 42 of United States Codes
Against all Defendants)

51. Plaintiff hereby realleges paragraphs 1 through 50, and incorporates them herein as though set forth in full.

52. This cause of action arises out of the United States Constitution, particularly under the provisions of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, and under Federal law, particularly Title 42 of the United States Code, Section 1983. Each and all of the acts of Defendants alleged herein in paragraph 23 through 50 above in depriving and conspiring to deprive Plaintiff of his First, Fifth, and Fourteenth Amendment rights by pressuring and requiring him to teach

evolutionism, a religious belief system, as a valid scientific theory, were done by Defendants, and each of them, not only as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs, policy and usages of Defendant SCHOOL DISTRICT, and under the authority of their office as administrators and employees for such school district.

53. Plaintiff is informed and believes and thereupon alleges that Defendant SCHOOL DISTRICT's customs, policy and usages with respect to Plaintiff was to have Defendants deprive and conspire to deprive Plaintiff of his First, Fifth, and Fourteenth Amendment rights by the acts alleged in paragraphs 23 through 50 above by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory.

54. The conduct of Defendants, and each of them, as alleged herein, deprived Plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States.

(A) The right of Plaintiff to be free from being forced by Defendant SCHOOL DISTRICT to be an agent for the establishment of the religious belief system of evolutionism and secular humanism under the First and Fourteenth Amendments to the Constitution of the United States;

(B) The right of Plaintiff to freedom of speech and academic freedom under the First and Fourteenth Amendment to the Constitution of the United States;

(C) The right of Plaintiff not to be deprived of life, liberty, or property without due process of law under the Fifth and Fourteenth Amendments of the United States Constitution; and

(D) The right of Plaintiff to the equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States.

55. As a proximate result of the aforedescribed conduct of the Defendants, and each of them, Plaintiff has suffered shock and injuries to his nervous system, all of which injuries have caused and continue to cause Plaintiff great mental and nervous

pain and suffering, and Plaintiff was further deprived of this United States Constitutional substantive rights of speech, religion, due process, and equal protection, all to his general damage in a sum which will be stated according to proof at trial.

56. The acts of Defendant, and each of them, with the exception of Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES, were willful, wanton, malicious, oppressive, and designed to injure Plaintiff, and justify an award of exemplary damages against all Defendants except Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES.

SECOND CAUSE OF ACTION

(Violation of Federal Rights Under Section 1985
Title 42 of United States Codes
Against all Defendants)

57. Plaintiff hereby realleges paragraphs 1 through 56 and incorporates them herein as though set forth in full.

58. This cause of action arises out of the United States Constitution, particularly under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, and under Federal law, particularly Title 42 of the United States Code, Section 1985. Each and all of the acts of Defendants alleged herein in paragraphs 23 through 50 in depriving and conspiring to deprive Plaintiff of his First Amendment rights by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory, were done by Defendants, and each of them, not only as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs, policy and usages of Defendant SCHOOL DISTRICT, and under the authority of their office as administrators and employees for such school district.

59. Plaintiff is informed and believes and thereupon alleges that Defendant SCHOOL DISTRICT's customs, policy and usages with respect to Plaintiff was to have Defendants deprive and conspire to deprive Plaintiff of his First, Fifth, and Fourteenth

Amendment rights by the acts alleged in paragraphs 23 through 50 above by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory.

60. Plaintiff is informed and believes, and thereupon alleges, that Defendants, and each of them, have engaged in acts of abuse, harassment, defamation, and intimidation by the alleged acts in paragraphs 23 through 50 above because Plaintiff belongs to the class of individuals who are practicing Christians and who refuse to accept the world view and religious belief system of evolutionism. Defendants, and each of them, harbor ill-will and malice against Plaintiff because he belongs to the said class of persons.

61. In or about 1990 and 1991, and within one year of the filing of this action, Defendants, and each of them, entered into an Agreement or mutual understanding with each other and with others presently unknown to Plaintiff, whereby they would seek to harass, intimidate, abuse, and defame Plaintiff and otherwise interfere with the liberty of, and otherwise deny equal protection of the laws, to Plaintiff.

62. In furtherance of the said conspiracy, Defendants committed the overt acts alleged above in paragraphs 23 through 50, among others.

63. As a direct and proximate result of said conspiracy, Plaintiff has suffered injuries and damages alleged below in violation of 42 U.S.C. Section 1985.

64. The conduct of Defendants, and each of them, as alleged herein, deprived Plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States:

(A) The right of Plaintiff to be free from being forced by Defendant SCHOOL DISTRICT to be an agent for the establishment of the religious belief system of evolutionism and secular humanism under the First and Fourteenth Amendments to the Constitution of the United States;

(B) The right of Plaintiff to freedom of speech and academic freedom under the First and Fourteenth Amendments to the Constitution of the United States;

(C) The right of Plaintiff not to be deprived of life, liberty, or property without due process of law under the Fifth and Fourteenth Amendments of the United States Constitution; and

(D) The right of Plaintiff to the equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States.

65. As a proximate result of the aforedescribed conduct of the Defendants, and each of them, Plaintiff has suffered shock and injuries to his nervous system, all of which injuries have caused and continue to cause Plaintiff great mental and nervous pain and suffering, and Plaintiff was further deprived of this United States Constitutional substantive rights of speech, religion, due process, and equal protection, all to his general damage in a sum which will be stated according to proof at trial.

66. The acts of defendants, and each of them, with the exception of Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES, were willful, wanton, malicious, oppressive and designed to injure Plaintiff, and justify an award of exemplary damages against all Defendants except Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES.

THIRD CAUSE OF ACTION

(Injunctive Relief Against All Defendants)

67. Plaintiff hereby realleges paragraphs 1 through 66 and incorporates them as thought set forth in full.

68. Plaintiff hereby requests this court for a preliminary and permanent injunction to grant him injunctive relief to prevent the immediate and irreparable injury, loss or damage that will result in Defendants continue to violate Plaintiff's rights, privileges, and immunities secured to him under the First, Fifth and Fourteenth Amendments to the United States Constitution by the acts alleged above. Plaintiff has no adequate remedy at law for

Defendants' violation of these rights.

FOURTH CAUSE OF ACTION
(Declaratory Relief)
(Against All Defendants)

69. Plaintiff hereby realleges paragraphs 1 through 68 and incorporates them herein as though set forth in full.

70. Plaintiff further invokes the jurisdiction of this Court pursuant to the Federal Declaratory Judgment Acts and ask this Court to order, adjudge and declare that the Defendants' actions in requiring Plaintiff to teach the religious belief system of evolutionism as a valid scientific theory violates the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Acts of 1881. Plaintiff further seeks to be awarded his costs and reasonable attorneys fees necessarily incurredin pursuing this action pursuant to the Federal Declaratory Judgment Act and 42 U.S.C. Section 1988.

FIFTH CAUSE OF ACTION
(Violation of the Tom Bane Civil Rights Acts)
(Against All Defendants)

71. Plaintiff hereby realleges paragraphs 1 through 70 and incorporates them herein as though set forth in full.

72. The acts of Defendants, as alleged above in paragraph 23 through 50, jointly and individually violate the Tom Bane Civil Rights Act as codified in California Civil Code Section 52.1 in Defendants have, by threat, intimidation or coercion, interfered with or attempted to interfere with Plaintiff's exercise and/or enjoyment of rights secured by the Constitution and laws of the United States and the Constitution and laws of the State of California.

73. As a result of the aforesaid actions by Defendants, Plaintiff has suffered damages in an amount to be determined by

proof at trail. Defendants' actions, with the exception of Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES were willful and malicious. Thus, Plaintiff is entitled to punitive damages from all Defendants except Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES.

SIXTH CAUSE OF ACTION

(Intentional Infliction of Emotional Harm)
(Against All Defendants)

74. Plaintiff hereby realleges paragraph 1 through 73 and incorporates them as though set though set forth in full.

75. The actions of Defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on Plaintiff.

76. As a result of the aforesaid actions by Defendants, Plaintiff has suffered damages in an amount to be determined by proof at trail. Defendants, action, with the exception of Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES, were willful and malicious. Thus, Plaintiff is entitled to punitive damages against all defendants except Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES.

PRAYER

WHEREFORE, Plaintiff prays judgment · against Defendants, together with costs, fees and disbursements of this action as follows:

1. Declaring that Defendants' conduct complained of is violative of Plaintiff's First, Fifth, and Fourteenth Amendment rights under the United States Constitution:

2. Declaring that Defendants' conduct complained of is violative of Plaintiff's right under California Civil Code Section 52.1 to be free from threat, intimidated or coercion in exercise or enjoyment of rights secured to all persons:

3. Granting Plaintiff a preliminary and permanent injunction restraining and enjoined the Defendants, the officers, directors, agents and representatives of Defendants, and all other persons whomsoever, known or unknown, acting on their own behalf or in concert with them, in any manner or by any means from:

A. Depriving Plaintiff of his First, fifth, and Amendments rights under the United States Constitution to freedom of speech, academic freedom, freedom of religion, due process and equal protection of the law by requiring Plaintiff to teach the religious belief system of evolutionism as a valid scientific theory;

B. Depriving Plaintiff of his First, Fifth, and Fourteenth Amendment rights under the United States Constitution to freedom of speech, academic freedom, freedom or religion, due process and equal protection of the laws by prohibiting Plaintiff from responding to student-initiated inquiries to Plaintiff regarding religion during non-instructional time on the school campus,

4. Granting general, compensatory and punitive damages;

5. Granting Plaintiff's reasonable attorney's fees, pursuant to, among other things, 42 U.S.C. Section 1988; and

6. Granting such other and further relief as the Court deems just and proper.

DATED: September 30, 1991

[signature block omitted]

DEMAND FOR JURY TRAIL [sic]

The Plaintiff in the above-entitled action requests a trail by jury as provided by Amendment VII of the United States Constitution and by Rule 38 of the Federal Rules of The Civil Procedure.

Dated: September 30, 1991

[signature block omitted]

②

Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

No. 94-1423

In The

Supreme Court of the United States

October Term, 1994

◆

JOHN E. PELOZA,

Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

◆

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeal

◆

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

◆

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QUESTIONS PRESENTED

Based upon the Complaint, documents provided by defendants which were incorporated therein by reference, and judicially noticed public records dealing with issues raised in the Complaint, the District Court dismissed Plaintiff John Peloza's federal civil rights and conspiracy lawsuit. The United States Court of Appeals for the Ninth Circuit affirmed that decision.

1. Does a public school district have the right and/or duty to preclude a teacher from religious proselytization of students when students are in attendance pursuant to compulsory education laws and the teacher is on paid contract time?

2. Is the Ninth Circuit's analysis in this case dealing with teacher speech and the Establishment Clause in conflict with the decisions of other circuits?

3. Did the Ninth Circuit err when, as part of its consideration of a motion for dismissal brought under Federal Rule of Civil Procedure 12(b)(6), it reviewed documents that were judicially noticed, and documents that were incorporated into the pleadings by reference?

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RELIEF REQUESTED

Defendants respectfully request that this Court deny Peloza's Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

◆

OPINIONS

The United States Court of Appeals for the Ninth Circuit issued its decision on October 4, 1994. The decision is reported as *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994). The decision affirmed the judgment of the United States District Court for the Central District of California filed on February 27, 1992, which is reported as *Peloza v. Capistrano Unified School Dist.*, 782 F.Supp. 1412 (C.D. Cal. 1992).

◆

JURISDICTION

Peloza's Complaint alleged a civil action for deprivation of rights under 42 U.S.C.A. sections 1981, 1983 and 1985 (West 1994). The District Court therefore had jurisdiction pursuant to 28 U.S.C.A. section 1331 (West 1993). This Court has jurisdiction pursuant to 28 U.S.C.A. Section 1254(a) (West 1993).

◆

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In pertinent part, Title 42 U.S.C.A. section 1983 (West 1994) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Relevant state statutes and regulations are set forth in Appendix A.

◆

STATEMENT OF THE CASE

Plaintiff John Peloza is a biology teacher at a public high school. Parents, teachers and students began expressing concerns that during paid contract time Peloza was advocating his religious beliefs to students in an attempt to proselytize them. Concerns were also raised over Peloza's apparent refusal to follow the established curriculum when teaching the subject of evolution. The Capistrano Unified School District ("District"), pursuant to its duty to avoid an Establishment Clause violation, directed Peloza to stop.

On September 3, 1991, Peloza filed his Complaint for Damages and for Injunctive and Declaratory Relief against Defendants the District, the Board of Trustees of the District, the principal and assistant principal of Capistrano Valley High School, several teachers at the high school, and an attorney employed by the Orange County Department of Education.

The primary thrust of the Complaint, as set forth in the first paragraph, concerned Peloza's desire, based on his religious principles, to avoid teaching the established biology curriculum relating to evolution. (Appendix to Petition 58a-60a). The Complaint incorporated by reference a written directive to Peloza, which dealt not only with teaching of the established curriculum but his proselytizing of students both within and outside his classroom. (Appendix to Petition 64a, para. 26.) Copies of that written directive and an earlier directive also incorporated into the Complaint by reference were supplied to the District Court as part of the Defendants' motion for dismissal under Federal Rule of Civil Procedure 12(b)(6). (The Declaration of Thomas Anthony, with the two exhibits setting forth the entire text of the directives, incorporated by reference into the Complaint in paragraph 26, is attached hereto as Appendix B.)

In addition to directing Peloza to comply with the State's Science Framework in teaching evolution,[1] the written reprimand set forth complaints from parents with respect to Peloza's proselytizing of students both during and outside of class, and contained specific directives with respect to his expected future conduct. (Appendix B at 4b-14b.) The parents complained about conversations with students during class, at lunch time, and after class. During these conversations, Peloza preached from the Bible and stated his convictions that those who did not believe in Jesus would go to hell, and would be subject to constant "burning, your teeth are getting knocked out, you are always suffering, there are demons around you for all eternity, and you can never leave." (Appendix B at 9b.) He went so far as to inform one Jewish student that because she was thinking of converting, she in fact was converted; he prayed with her and then told her that she was irrevocably converted. (Appendix B at 9b-10b.)

These types of complaints prompted the District to give Peloza the following directive on February 7, 1991:

---

[1] At Defendants' request, the District Court also took judicial notice of the California Department of Education's Science Framework which Peloza was required to follow. (See Appendix to Petition at 4a.) As noted by the incorporated directive, Peloza was specifically directed to teach the theory of evolution as required by the State Framework. (See Appendix B at 13b-14b.) Although the major thrust of Peloza's arguments at both the trial and appellate court levels was his contention that he should not be required to teach evolution as part of the standard biology curriculum, Peloza has apparently decided not to pursue that issue as part of this Petition, since the issues raised in that respect were in fact decided by this Court in *Edwards v. Aguillar*, 482 U.S. 578 (1987).

> You are hereby directed to refrain from any discussion of religion in any of your science classes, and to refrain from attempting to influence your students to accept your own personal religious or philosophical beliefs. You are directed to follow the course outlines in the subject area of high school biology and, more specifically, in the teaching of evolution.
>
> You are further directed to refrain from making any comments about Jesus Christ, about the fact that people who do not believe in Jesus Christ burn in hell, and to refrain from discussing religion or quoting from the Bible during any of your classes. If a student does ask you a question about religion, you are directed to refer them to their parents or to their own clergy person for guidance. (Appendix B at 13b-14b.)

Peloza's constant inquiries and assertions that during the school day he was free to conduct himself as he desired outside of the classroom (Appendix to Petition at 65a-66a, para. 32), led the District to expand its original directive. On May 13, 1991, the District issued a second expanded directive. The May 13, 1991, directive is set forth in paragraph 43 of the Complaint, as follows:

> You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day. Please be advised that should you fail to comply with

> these written directives, or should there be any additional incidents of this kind, further disciplinary action will be considered. (Appendix to Petition at 68a, para. 43.)

As noted in the Ninth Circuit opinion:

> Peloza seeks a declaration that this definition of instructional time is too broad, and that he should be allowed to participate in student-initiated discussions of religious matters when he is not actually teaching class. (Appendix to Petition at 46a-47a; see also paragraph 3 of the Complaint (Appendix to Petition at 60a) wherein Peloza asserts that the definition of instructional time is too broad.)[2]

The District consistently has taken the position that while acting in a paid status as a public school teacher, Peloza was not free to use his District paid time and position to preach his religious beliefs to students who were present pursuant to compulsory attendance laws.

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[2] Throughout the record of these proceedings there are alternate references to "instructional time" and "contract time," which, in effect, have essentially the same meaning when students are present. (See Petition at page 4 for definition of contract time as "anytime while working as a teacher." See also, Appendix to Petition at 47a.) In all respects Plaintiff is on paid time and functioning as a teacher. In his Opening Brief to the Ninth Circuit, Plaintiff stated:

> Contract time is the time when a teacher is required to be on the school premises but is not involved in classroom instruction. . . . Again, Peloza sought a declaration of his rights to have private, student-initiated discussions on religious topics during his contract time and not during classroom time. (Appellant's Opening Brief to the Ninth Circuit at pp. 47-48.)

The District's position mirrors the California Education Code and state regulations which include within the instructional day times when students are required by compulsory attendance laws to be present at school. Cal. Code Regs. tit. 5, §§ 5552, 5570 (1995); Cal. Educ. Code, § 44807 (West 1993). See also *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 14, n. 12, 137 Cal. Rptr. 43, 50, *cert. denied*, 434 U.S. 877 (1977). Cf. *Katz v. McAulay*, 438 F.2d 1058, 1061 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972).

In considering this issue, the District Court noted among other things that the District has a strong interest in maintaining its secular purpose of educating students and protecting students' right to freedom from religious influence and indoctrination in public school classrooms. (Appendix to Petition at 13a.) The court concluded that the District correctly instructed Peloza to refer religious issues raised by students to their parents or clergy. The court noted:

> This instruction is not a violation of the plaintiff's first amendment right to free speech, but rather a directive to insure that religious dogma is not taught in the public school. (Appendix to Petition at 14a.)

In upholding the decision, the Ninth Circuit, after reviewing this Court's decisions in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506-07 (1969) (*"Tinker"*), and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, ___ U.S. ___, 113 S.Ct. 2141, 2148 (1993), concluded that the District's directive was consistent with its constitutional responsibility to avoid violation of the Establishment Clause. The court majority stated:

> While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. (Appendix to Petition at 47a-48a.)

Peloza sought a rehearing, with a suggestion of rehearing en banc, with the United States Court of Appeals for the Ninth Circuit, which was denied on November 25, 1994. (Appendix to Petition at 57a.) This Petition for Writ of Certiorari followed.

◆

SUMMARY OF ARGUMENT

The District issued specific directives to Peloza precluding him from proselytizing students both in and out of the classroom when acting as a paid teacher. Both the trial and appellate courts reviewed those directives as part of their respective proceedings.

In issuing those directives, the District acted well within its rights and responsibilities as recognized by decisions from this Court. In light of the well-established state of the law and a lack of any real conflict between any of the circuits, no basis justifies granting the Petition for Writ of Certiorari.

◆

REASONS FOR DENYING THE WRIT

I

THE DISTRICT HAD BOTH THE RIGHT AND THE RESPONSIBILITY TO INSURE THAT PUBLIC SCHOOL TEACHERS DO NOT USE THEIR POSITIONS FOR FURTHERING THEIR OWN PERSONAL RELIGIOUS INTERESTS.

In *Hazelwood School Dist. v. Kuhlmeir,* 484 U.S. 260 (1988) ("*Hazelwood*"), this Court recognized that public schools do not necessarily qualify as public fora and that school officials may impose reasonable restrictions on the speech of students, teachers and other members of the school community. 484 U.S. at 267. The Court distinguished *Tinker* on the basis that there is a substantial difference between tolerating and promoting individual speech. 484 U.S. at 270-271. With respect to a school district's right to be free from promoting particular speech, the Court recognized that a school had authority over such school-sponsored matters as publications, theatrical productions, and "other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* The Court went on to note that these types of activities "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." 484 U.S. at 271.[3]

The Court concluded that district officials were entitled to exercise greater control over this type of expression in order to "assure . . . that the views of the individual speaker are not necessarily attributed to the school." *Id.* In *Hazelwood,* this Court found no offense to the First Amendment when control was asserted over speech in school-sponsored expressive activity so long as the control was reasonably related to legitimate pedagogical concerns. 484 U.S. at 272.

A key character in the school-sponsored educational process is the paid school teacher. Not only is the teacher involved in the presentation of information or curriculum but he/she is also a disciplinarian, holding students responsible for their conduct at all times while on the school campus. Cal. Educ. Code § 44807 (West 1993). *See also* Cal. Code Regs. tit. 5, § 5552 (West 1995). State law requires that the teacher be present at least 30 minutes before the instructional day begins. Cal. Code Regs. tit. 5, § 5570 (West 1995). The teacher also serves as a role model. "[W]hether consciously or otherwise," the teacher "demonstrates the appropriate form of civil discourse and public political expression by his conduct and deportment in and out of class." *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986). *See also*

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[3] In *Tinker,* the Court also recognized that the cafeteria, playing field, or other on-campus areas where students are present during authorized hours are important to the educational process. 393 U.S. at p. 512.

Edwards v. Aguillar, 482 U.S. 578, 583 (1987); and *Board of Educ. of the Westside Community Schools v. Mergens,* 496 U.S. 226, 251 (1990). Because teachers serve a unique role as disciplinarians and role models, a school district has the right to hold them accountable for their conduct, including speech, to insure that it furthers the interest and purpose for which they are hired. *See Pickering v. Board of Educ.,* 391 U.S. 563 (1968) (*"Pickering"*). Teaching religion is clearly not a part of that purpose and, in fact, is contrary to the Establishment Clause protections guaranteed to students and their parents. As noted by this Court in *Edwards v. Aguillar*:

> Families entrust public schools with the education of their children, but condition that trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable, and their attendance is involuntary.

482 U.S. at 583-84.

This Court has further declared that, "[t]he state must be certain, given the religion clauses, that subsidized teachers do not inculcate religion." *Lemon v. Kurtzman,* 403 U.S. 602, 619 (1971). *See also Leavitt v. Committee for Public Educ. and Religious Liberty,* 413 U.S. 472, 480 (1973) ("[t]he state is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.")

Congress has also recognized that teacher involvement in religious discussions while on paid time violates the Establishment Clause. In the 1984 Equal Access Act, which enables students to participate in religious discussions where a limited open forum has been established,[4] Congress specifically provided that school district employees could only attend religious group discussions in a non-participatory capacity. 20 U.S.C.A. § 4071(c)(3) (West 1990). Subsequently, this Court recognized that this non-participation by school authorities was essential in order to insure that implementation of the Equal Access

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[4] Public school is clearly not a forum for religious expression by teachers. See discussion of *Hazelwood, supra,* at pp. 10-11. While it may become a limited open forum for student thought and expression where religious speech is accommodated, that accommodation clearly does not require that teacher expression of religious sentiment be included. 20 U.S.C.A. § 4071(c) (West 1990). *Board of Educ. of the Westside Community Schools v. Mergens,* 496 U.S. 226, 251-253 (1990). Moreover, this Court has recognized that the state may reasonably regulate speech to insure that it comes within the intended purpose of a non-public forum provided that it does not suppress expression merely because of opposition to a speaker's particular viewpoint. See *Perry Educ. Ass'n v. Perry Local Educators Ass'n,* 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP Legal Defense and Educ. Fund,* 473 U.S. 788, 806 (1985); *Hazelwood,* 484 U.S. at 272. For public employees acting within the workplace, that regulation may include speech which is detrimental to the purpose for which they are employed. *See Pickering; Rankin v. McPherson,* 483 U.S. 378 (1987); *Connick v. Myers,* 461 U.S. 138 (1983).

Each of these cases recognizes the validity of content-based restrictions on public employee speech. See particularly discussion in *Connick v. Myers,* 461 U.S. at 147-148. Furthermore, assertions that the Peloza case involves viewpoint restriction are not well-taken. Nowhere in the Complaint is there an allegation that the District has allowed some teachers to engage in religious discussion with students. That Peloza alone may have been given a specific directive in this regard is nothing more than a function of the fact that he alone aggressively proselytized students, prompting parental complaints requiring District intervention.

Act. *Board of Educ. of the Westside Community Schools v. Mergens,* 496 U.S. 226, 251-253, 260 (1990) (Kennedy, J. concurring).

Upon receiving complaints from parents and students that Peloza, in his capacity as a teacher, was actively engaged in sharing his beliefs relating to the Bible, Jesus Christ, hell, salvation, and the conversion process, the District acted to insure that if these discussions were occurring, they would not continue. The District instructed Peloza not to use his position as a teacher to advance his religious beliefs. (Appendix B at 13b-14b.) The District instructed him to refer student questions relating to religion to parents or clergy. (Appendix B at 14b.)

Peloza asserted a right to engage in those discussions during lunch and other times when students were not actually in class. (See Appendix to Petition at 61a-62a, para. 32). The District clarified the matter to insure Peloza understood that instructional time included time when students were present at school as a result of compulsory attendance laws and when he was on paid duty (Appendix to Petition at 68a, para. 43). In doing so, the District followed this Court's mandate to insure that a subsidized teacher is not inculcating religion, thereby protecting the constitutional rights of students and parents (which is a legitimate pedagogical concern). *Hazelwood School Dist. v. Kuhlmeir,* 484 U.S. 260, 272 (1988). Indeed, the Ninth Circuit recognizes the District had a compelling interest to insure it did not violate the Establishment Clause. (Appendix to Petition at 47a.) See also *Lamb's Chapel v. Center Moriches Union Free School Dist.,* ___ U.S. ___, 113 S.Ct. 2141, 2148 (1993).

II

THERE IS NO CONFLICT BETWEEN THE CIRCUITS IN CASES INVOLVING TEACHER DISCIPLINE OR RESTRICTIONS RELATING TO SPEECH AND ACADEMIC FREEDOM.

Peloza entices this Court to grant a Petition for Writ of Certiorari by asserting a non-existent conflict between the circuits. Peloza asserts that this Court's decisions in *Pickering* and *Tinker* are in conflict. *Pickering* and *Tinker* are however, entirely consistent. Just as there is no conflict between those two decisions, there is no conflict between the circuits. Moreover, as recognized by this Court, questions relating to teacher speech are often decided on the basis of their individual circumstances. *Pickering,* 391 U.S. at 569. Finally, the cases Peloza relies upon do not concern the Establishment Clause.[5]

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[5] In discussing many of the cases which Peloza cites as creating two separate and distinct tests, one commentator cited by Peloza in his brief has noted that the tests "closely approximate" each other, and further notes that "both tests" offer teachers substantial first amendment protection of their speech. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach,* 63 N.Y.U. L.Rev. 693, 708 (June 1990). That same commentator also concludes that cases involving the permissibility of teaching religious values in schools decided on establishment grounds are of little value in reaching a determination on regulating teacher expression that does not involve religious values. *Id.*, at pp. 696-697. Only one of the circuit cases Peloza cites deals with the religion issue, which was fundamental to the determination of both courts below. Moreover, an actual reading of the cases cited at page 13 of the Petition does not support the conclusion reached. Some of the cases do not even discuss *Pickering* or *Tinker.* See, e.g., *Keefe v. Geanakos,* 418 F.2d 359 (1st Cir. 1969); *East Hartford Educ. Assoc. v. Board of*

In *Pickering v. Board of Educ.*, 391 U.S. at 568, this Court concluded that a school district acting as an employer has an interest in regulating the speech of its employees to insure that its public mission is accomplished. The Court recognized that teachers do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Id.* The Court concluded that, if the teacher's speech would harm the school's ability to operate efficiently or inhibit the teacher's ability to carry out his/her duties, the speech could be regulated. See 391 U.S. at 572-73. There is nothing inconsistent between this holding and this Court's decision in *Tinker.*

In *Tinker,* the Court recognized that students, as well as teachers, did not shed their constitutional rights at the

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Educ., etc., 562 F.2d 838 (2d Cir. 1977). Others do not involve teacher rights to speech but the rights of students to particular instructional materials. *Zykan v. Warsaw*, 631 F.2d 1300 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976). The most recent decisions cited are based on this Court's analysis in *Hazelwood* and conclude that the issue is one of limitations which are reasonably related to pedagogical concerns. See *Ward v. Hickey,* 996 F.2d 448 (1st Cir. 1993); *Miles v. Denver Public Schools,* 944 F.2d 773 (10th Cir. 1991); *Bishop v. Aronov,* 926 F.2d 1066 (11th Cir. 1991). Indeed, it is difficult to see any difference between the standard applied in these last three cases and that applied by the Ninth Circuit in *Nicholson v. Board of Educ.,* 682 F.2d 858 (9th Cir. 1982), which allowed a school district to insure that teacher expression did not impede the teacher's proper performance of duties in the classroom or interfere with the regular operations of schools. *Nicholson* was cited with approval by this Court in *Hazelwood,* 484 U.S. at 273, n. 7.

schoolhouse door. 393 U.S. at 506. As in *Pickering*, the Court in *Tinker* recognized the obligation of school officials to prescribe and control conduct in the schools. 393 U.S. at 507. In dealing with student speech, the Court concluded that the case did not concern speech that intruded on the rights of other students. 393 U.S. at 508. The Court also concluded that the public school had a legitimate interest in regulating speech which would substantially interfere with the work of the school *or* impinge upon the rights of others. 393 U.S. at 509, 513. The *Tinker* court also recognized that the students' right to freedom of speech would yield to a constitutionally valid reason for regulation. 393 U.S. at 511.

In this case, both the Ninth Circuit and District Court recognized *Tinker* and concluded that the directives issued by the Defendants were an appropriate regulation of employee speech in light of the constitutional mandates of the Establishment Clause, combined with the rights of students and parents to be free from proselytization by a paid teacher in a public school setting. (Appendix to Petition at 13a and 47a.) These decisions by the courts below are consistent with both *Tinker* and *Pickering*.

The Ninth Circuit's decision in this case is substantially similar to decisions in the Tenth and Eleventh Circuits dealing with teachers involved in religious speech while performing official duties. Rather than being inconsistent with these circuits as asserted at page 13 of the Petition, the Ninth Circuit in this case reached a similar result in recognizing a school district's right to restrict religious speech directed at students by public school teachers while on duty. *Bishop v. Aronov*, 926 F.2d 1066

(11th Cir. 1991); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990).

III

DISMISSAL OF THIS ACTION WAS APPROPRIATE IN LIGHT OF DOCUMENTS JUDICIALLY NOTICED AND INCORPORATED IN THE COMPLAINT BY REFERENCE.

While it is true that in considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court assumes the existence of well-pled facts, it is equally true that mere conclusions of the pleader are not accepted as true. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993); *Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir. 1991). Moreover, the court is not required to accept as true assertions which are contrary to matters of which the court may take judicial notice. *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993); *Kramer v. Time-Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). The Court may look to material found in documents incorporated by reference in the complaint or which form the basis of the complaint. *Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1196 (3rd Cir. 1993); *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Fudge v. Penthouse Int'l. Ltd.*, 840 F.2d 1012, 1014-1015 (1st Cir. 1988). *See also Webster v. New Lenox School Dist. No. 122*, 917 F.2d 1004, 1006 (7th Cir. 1990).

In this case, the District Court had not only the Complaint and the documents incorporated therein by reference, but also the State Curriculum Framework for the Teaching of Science which set forth the requirements for biology instruction relating to evolution. As a result, there was no factual question as to what the District required Peloza to teach, or whether the instruction he was required to give involved atheism or inhibition of religion, as asserted in the Petition at page 20, note 9. As set forth in the written directives, Peloza had been directed to teach the subject of evolution in compliance with the California Department of Education Science Framework. Many of the concepts relating to the theory of evolution contained in that Framework are also set forth in the incorporated directives. (Appendix B at 15b-20b.)

This information provided the factual basis for the trial court's description of the theory of evolution, which the appellate court accepted. (Appendix to Petition at 12a and 45a-46.) What Peloza and all public school teachers in California were required to teach is nothing more nor less than what this Court has on several occasions recognized as a valid scientific theory which may be taught in public schools without violating the Establishment Clause. See *Epperson v. Arkansas,* 393 U.S. 97 (1968), and *Edwards v. Aguillar,* 482 U.S. 578 (1987). Moreover, the requirement that Peloza not teach creationism as a counterbalance to evolution is also appropriate constitutionally as recognized by this Court in *Edwards*.

In light of the fact that what Peloza was required to teach was not in violation of the Establishment Clause, there is no constitutional basis for asserting that he can substitute his own materials for the established curriculum. See *Epperson v. Arkansas,* 393 U.S. at 107. Finally, the requirement that Peloza not engage in religious discussion with students while on paid time is also a subject which can be decided as a matter of law. Consequently, the Ninth Circuit did not err in granting a judgment affirming the District Court's dismissal of Peloza's Section 1983 and Section 1985 claims.

◆

CONCLUSION

The issues raised by the facts and circumstances of this case have been clearly resolved by prior decisions of this Court. There simply is no basis in law for asserting that a paid public school teacher can use his position and paid time to proselytize students, whether in or out of class. Nothing in this Court's prior decisions, nor in any case pending before this Court, suggests that there is now or ever will be a legal basis for such an assertion. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX A

CALIFORNIA EDUCATION CODE

§ 44807. Duty concerning conduct of pupils

Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess. A teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning. The provisions of this section are in addition to and do not supersede the provisions of Section 49000.

CALIFORNIA CODE OF REGULATIONS, TITLE 5

§ 5552. Playground Supervision.

Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision by certificated employees of the conduct and safety, and for the direction of the play, of the pupils of the school who are on the school grounds during recess and other intermissions and before and after school.

CALIFORNIA CODE OF REGULATIONS, TITLE 5

§ 5570. When School Shall Be Open and Teachers Present.

Unless otherwise provided by rule of the governing board of the school district, teachers are required to be present at their respective rooms, and to open them for admission of the pupils, not less than 30 minutes before the time prescribed for commencing school.

All teachers shall observe punctually the hours fixed by regulation of the governing board of the school district for opening and closing school.

APPENDIX B

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Telephone: (714) 641-5100

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN E. PELOZA,

Plaintiff,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, BOARD OF TRUSTEES OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT, PAUL B. HASEMAN, CRYSTAL KOCHENDORFER, MARLENE M. DRAPER, ANNETTE B. GUDE, KATHRYN I. ITZEL, E.G. KOPP, A. EDWARD WESTBERG, JEROME R. THORNSLEY, WILLIAM D. ELLER, GERALDINE JAFFE, THOMAS R. ANTHONY, ROSS VELDERRAINE, JAMES CORBETT, PAUL PFLUEGER, RAY PANICI, TIM DUNN, WILLIAM REDDING AND DOES 1 THROUGH 200, INCLUSIVE,

CASE NO.
CV 91-5268
DWW(Bx)

DECLARATION
OF THOMAS
ANTHONY

[F.R.C.P. 12(b)6,
Fed. R. Ev. 201]
DATE:
December 16, 1991
TIME: 9:00 a.m.
COURTROOM:
Honorable
David W. Williams

DECLARATION OF THOMAS ANTHONY

I, THOMAS ANTHONY declare as follows:

1. I am currently the Director of Secondary Schools for the Capistrano Unified School District and a defendant in the above-entitled action. From July, 1986 to July, 1991 I was the principal of Capistrano Valley High School, the school where Plaintiff John Peloza has been teaching biology class during all times relevant to this litigation.

2. While I was principal of Capistrano Valley High School, it was my responsibility to ensure that all state and district curriculum guidelines, frameworks and policies were adhered to in all classes taught at Capistrano Valley High School. Whenever a curriculum was not being followed by an individual teacher, it was my responsibility to investigate the matter and, when necessary, take appropriate steps to make sure that the assigned curriculum would be followed.

3. With respect to Plaintiff, it came to my attention that there were complaints being lodged with my office indicating that he was not following the assigned curriculum regarding the teaching of evolution in his biology class. I investigated the matter and, as a result of that investigation, on February 7, 1991 I personally issued Plaintiff a Written Reprimand. This Reprimand is the same February 7, 1991 Reprimand that Plaintiff alleges I issued to him in Paragraph 26 of his Complaint.

4. In Paragraph 26 of his Complaint, Plaintiff incorporates the February 7, 1991 Reprimand into his Complaint as part of his allegations. A true and correct copy

of that Reprimand given from me to Plaintiff is attached hereto as Exhibit A to my Declaration.

5. Paragraph 26 also incorporates by reference into the Complaint an October 11, 1990 letter from then Vice Principal Ross Velderraine to Plaintiff. I assisted in the drafting of that letter and personally reviewed it prior to it being delivered to Plaintiff. Additionally, I have reviewed Plaintiff's personnel file in order to make sure that the October 11, 1990 letter incorporated by reference in Plaintiff's Complaint is the only October 11, 1990 letter from Ross Velderraine. After reviewing the letter and Plaintiff's personnel file, I can state that a true and correct copy of the October 11, 1990 letter from Ross Velderraine to Plaintiff and incorporated by reference in Paragraph 26 of Plaintiff's Complaint is attached to my Declaration as Exhibit B.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this Illegible day of November, 1991, at Illegible, California.

/s/ Thomas Anthony
Thomas Anthony

7/237/061458-0016/004

Exhibit A

CAPISTRANO UNIFIED SCHOOL DISTRICT

CAPISTRANO VALLEY HIGH SCHOOL
Mission Viejo, California

February 7, 1991

TO: John Peloza, Teacher, Capistrano Valley High School

FROM: Tom Anthony, Principal, Capistrano Valley High School

SUBJECT: REPRIMAND

This letter constitutes a formal written reprimand for your repeated refusal to follow course outlines and curriculum guides regarding the teaching of evolution as a valid scientific theory to your high school Biology classes. This letter also constitutes a formal written reprimand for your inappropriate discussion of religion with students in an attempt to convert them to Christianity.

On June 9, 1990, a meeting was held between Bill Redding, Curriculum Specialist for Science, you and Mr. Velderrain, Vice Principal. During that meeting you were advised that you must always follow course outlines and curriculum guides provided by the District and that you must not teach creationism in the classroom as it does not comply with the State Framework on Science. You were advised that you are not to teach religion in the classroom in the context of the subject matter of evolution.

In a letter dated October 11, 1990, from Ross Velderrain, you were given clear directions as to what the Capistrano

Unified School District expects you to teach in the subject of evolution in compliance with the California State Department of Education Science Framework, and to inform you not to teach creationism in the classroom. A copy of Mr. Velderrain's October 11, 1990, letter is attached to this reprimand. These issues have been raised with you during the past two years pursuant to complaints from parents, students and other staff members. Mr. Velderrain's letter of October 11, 1990, clearly informed you that your presentation of the theory of evolution violated both the letter and the spirit of the state curriculum guidelines whose intent is to have evolution taught as one of the main themes of science and that creationism not be taught in the classroom. Further, he told you he would be available to assist you in meeting the objective of developing lesson plans that presented evolution as a valid scientific theory.

As a follow-up to the October 11, 1990, letter, several meetings were held between you, Dr. Harold Hester, Director of Secondary Education for the District, Bill Redding, and Mr. Velderrain regarding your lesson plans on the unit of evolution for the 1990-91 school year. After several meetings, it was agreed that Dr. Hester and Mr. Velderrain would separately observe you as well as other biology teachers at the high school teaching evolution to their classes. During these classroom observations by Dr. Hester and Mr. Velderrain you began your unit on evolution by passing out an outline entitled "Evidence in Support of the Refutation to Evolution": similar to the outline you had passed out in the 1989-90 school year.

Although when you were formally observed by administrators you did not make any religious comments or directly attach [sic] evolution as an invalid scientific theory, several students who are in different periods of your high school Biology classes stated that since the beginning of the 1990-91 school year you have made many comments regarding your views on creationism. Following is a summary and some specific instances where inappropriate curriculum was taught or inappropriate comments to students were made.

Several students heard you state at the beginning of the 1990-91 school year that you had a movie on prehistoric man that you wanted to show to the students but that the school board would not let you do it because they would disapprove. You stated that you were a creationist and that you were free to say it. At the beginning of the 1990-91 school year, you stated to your second period Biology class, "I know it's not legal to teach religion in class, but I don't care if I get fired for my beliefs." You stated that you have been with the District ten years and have not been fired yet.

During the first semester of the 1990-91 school year, you stated that the Bible was the historical way and that it cannot be proven wrong. On more than one occasion since the beginning of the 1990-91 school year, you have stated to your students that the school board won't let you teach what you want to on creation. In September of 1990 you stated that you were "a creationist" and that "we will go into evolution but I am a creationist."

Several of your students remarked that your method of teaching them the unit on evolution was to instruct them to outline the chapters in the science textbook on their own, and that the next day in class you would show the students how the information they had outlined the previous day on evolution was wrong. Often when you were asked a question by a student on an issue such as prehistoric fossils, your reply was that what the text said was all wrong, there was no proof, and you would state what creationism said about the issue. When you taught units other than evolution you followed the textbook. According to several of your students you spent approximately a week and a half teaching the class about how evolution was wrong, disproving it and almost never used the textbook. You "taught" them the theory of evolution by telling the students to read the chapters in the book, but never teaching it yourself.

Sometime in October, 1990, during your second period Biology class in response to a remark by you that anyone who did not believe in Jesus Christ would go to hell, [deleted]* told you that she did not believe in Jesus Christ and that she knew she was not going to hell. You told her to come in at lunchtime and talk to you about this in your office. [deleted] came into your classroom during lunchtime with another student, [deleted].

During your lunchtime conversation with [deleted], you began by taking out a Bible from your brief case. [deleted] asked you how you could state that God exists and you quoted various portions of the Bible to prove that God did exist. [deleted] remarked that the Bible can be interpreted in many different ways depending on who is reading it. You replied that "My way is the right way because I believe in Jesus Christ" and then stated, "if you do not believe in Jesus, you will go to hell."

---

*The names of the students have been deleted to protect their identity.

[deleted] replied that Jews do not believe in hell and Jews do not believe that Jesus is the Messiah. You replied "What I believe is in Jesus and you should believe it too." [deleted] asked if you were here to convert her and you stated no, you were here to get people to be aware of religion and that everybody should believe in being a Christian just like you did. You stated, "If you believe in Jesus and you sign and you ask Jesus to forgive you, he will because he forgives and forgets." You further stated that there is so much sin on Earth because the devil has come out and taken over the world and that at this time Jesus is holding the world together in his hands.

On December 18, 1990, [deleted] and [deleted], parents of [deleted], lodged a formal written complaint protesting your preaching religion to your students, stating that you said those students who did not accept Jesus Christ would definitely "go to hell." The [deleted] further protested what they stated to be your absolute rejection of the theory of evolution, your characterization of it as undocumented fact and objected to your teaching to your science classes that the theories of the Bible regarding creationism were the only truth about evolution.

On December 9, 1990, [deleted] the father of [deleted] also lodged a formal written complaint against you. The substance of Mr. [deleted] complaint was that during your sixth period Biology class you proceeded to discuss the merits of fundamentalist Christianity, stating that if one did not believe in divine creation and the divinity of Jesus Christ one was doomed to go to hell for all of eternity. According to Mr. [deleted], you described what would happen to someone who did not believe in Jesus Christ in graphic detail.

Mr. [deleted] centers around an incident that took place on November 27, 1990, during seventh period between you, his daughter [deleted] and another student [deleted]. On November 27, 1990, these two students stayed after class because they were trying to prove that you were wrong about evolution, the Lucy skeleton and transitional forms. During this discussion you stated that none of these things were true and that "there has to be a creator." According to [deleted] you then "preached that Jesus is the only way." You explained hell to [deleted] as follows; "You are constantly burning, your teeth are getting knocked out, you are always suffering, there are demons around you for all eternity, and you can never leave." You also stated that, "if you do not believe in Jesus Christ you will burn in hell forever." You told these girls that there are lots of ways to get to hell but there is only one way to get to heaven and that is to believe in Jesus Christ as God. [deleted] told you that she believed in God and you remarked that "Jesus is God so you don't believe in God if you do not believe in Jesus."

[deleted] asked you what happened if you were a good person and you responded, "It doesn't matter if you don't believe in Jesus." You further stated that "God was not fair but if God were fair everyone would be in hell because all of humanity are such sinners." [deleted] then told you she was really worried about her family going to hell especially her seven-year-old brother. You told her that it was a shame her parents were so stubborn in not letting her believe the right way, i.e., that Jesus was God.

[deleted] told you she was thinking about converting because she did not want to go to hell.

You then told [deleted] she was already a Christian because once you have converted you become a Christian and you cannot take it back. You told her that God, meaning Jesus, would never kick [deleted] out of heaven. After that, you remarked, "Let's pray together." The three of you closed your eyes and put your heads down. You instructed [deleted] to accept Jesus into her heart and to repeat the following words: "I [deleted], will want Jesus to love me, accept me and take me into his heart." You then stated, "This is final, that's it 'you're a Christian' you cannot take it back." You asked [deleted] if she would like a Bible and then joked "I'll get you a pocket Bible so your parents won't know."

[deleted] was very distraught after this conversion and on November 28, 1990, told her mother about the conversion and how badly she felt because no one else in her family would be going to heaven with her. [deleted] called her Rabbi and went to his house with her father.

On December 11, 1990, at your instigation, you switched sixth period Biology classes with Mr. Ray Panici for that one day only. According to several of your students the purpose of your switching classes with Mr. Panici was because you stated that you were biased towards creationism and you wanted to be fair; therefore, you thought that the two classes should switch teachers so they could hear Mr. Panici's view since he was an evolutionist.

On December 12, 1990, your sixth period Biology class was having a discussion on what Mr. Panici had taught them. You got into a discussion on satanism and several members of the class remarked that you could not prove the satanism was wrong. Several students kept insisting that it was not fair for you to state that evolution and satanism were wrong because you could not disprove these things. At that point you started to discuss the Bible.

You quoted from the Book of Genesis, discussing Adam and Eve, discussing other portions of the Bible and in essence "preaching" to your class. You also discussed Lucifer stating that there were three angels besides God and Lucifer was kicked out of heaven and sent down to hell. You stated that the devil made Eve take the apple from the tree and that is how the devil got dominion over the Earth. You then stated that now the devil rules over the Earth and that is why the world is evil and why we have sin. Although you began this discussion with the Book of Genesis you kept quoting numerous Biblical passages from memory. You talked a long time about Jesus Christ, preached about Jesus, and stated there was no other way to believe and that you "know the one way is right." You also discussed extensively good versus evil and Jesus or Christians versus everyone else. This discussion took place for approximately 15 to 20 minutes during your sixth period Biology class on December 12, 1990.

During the first semester of the 1990-91 school year, in your second period Biology class, you got entirely off the subject matter and made the following statements to the entire class. You told the class that you saw Jesus Christ save your brother and that you had also seen Jesus save you sister. Whenever you discussed the subject of evolution you said you didn't believe in it and that the Bible was the one true written document. Sometime in October 1990 you were discussing evolution in your second period Biology class when the class got on the subject of religion and you stated, "if you do not believe in Jesus Christ, you will go to hell."

Faculty members have also taken exception to contradictory statements and apparent misinformation conveyed by you regarding the subject matter of evolution. Another high school Science teacher was teaching atomic theory to his classes and quoted a statement from Dr. David Goodstein of Cal Tech as follows:

> "There are theories in science which are so well verified by experience that they become promoted to the status of fact. One example is the special theory of relativity, it's still called theory for historical reasons, but it is in reality a simple engineering fact routinely used in the design of giant machines like nuclear particle accelerators which always work perfectly. Another example of that sort of thing is the theory of evolution. These are called theories but they are in reality among the best of established facts in all of human knowledge. Our job today is to look into those facts and theories and models which underlie our understanding of the ultimate constituents of matter."

Immediately after the teacher read this statement by Dr. Goodstein, several students took exception to these remarks stating that they were not true and that this individual should talk to Mr. Peloza who would set him straight on evolution.

A Social Science teacher was discussing social Darwinism in her World History class when several of her students reacted very negatively to the term Darwinism stating that it had no scientific basis, was not provable, and was against the Bible. They cited you as the source of their information. According to one student you had told them that "Darwinism is the same as Communism." This teacher was distressed by the idea that students were being taught theology along with Biology so that the result was that some students were not even open to discuss how the concept of Darwinism impacted history.

The District has the responsibility to monitor the content of its teachers' lesson plans to ensure that the establishment clause of the First Amendment is not violated. A teacher's freedom to exercise and express their religious preference is limited by their students' rights to be free from religious indoctrination or influence in the classroom. The District's Board Policy on the Instruction of Controversial Issues, number 6136, Section IV (B) 13, explicitly states that teachers have the responsibility to "refrain from attempting to indoctrinate students with his/her point of view." When a teacher in a public school uses religion and teaches religious beliefs in a science class, or espouses theories which are clearly based on religious underpinnings, the principles of the separation of church and state are clearly violated.

You are hereby directed to refrain from any discussion of religion in any of your science classes and to refrain from attempting to influence your students to accept your own personal religious or philosophical beliefs. You are directed to follow the course outlines in the subject area of high school Biology and more specifically in the teaching of evolution.

You are further directed to refrain from making any comments about Jesus Christ, about the fact that people who do not believe in Jesus Christ burn in hell, and to refrain from discussing religion or quoting from the Bible during any of your classes. If a student does ask you a question about religion, you are directed to refer them to their parents or to their own clergy person for guidance.

You are further directed to teach evolution as a valid scientific theory and to refrain from any teaching of creationism as a valid scientific theory. This direction to teach evolution as a valid scientific theory is a part of the accepted and adopted school curriculum in high school Biology and your refusal to teach evolution can be construed to constitute persistent failure to obey local and state rules and regulations regarding classroom instruction, evident unfitness for service and unprofessional conduct. You are explicitly directed to refrain from teaching creationism in addition to, rather than, or in refutation to, evolution. Please be advised that should you fail to comply with these written directives or should there by [sic] any additional incidents of this kind, further disciplinary action will be considered.

A copy of this written reprimand will be placed in your personnel file ten (10) days from today. If you wish to respond in writing to this reprimand, please do so within ten (10) calendar days by sending your response to Dr. Harold Hester, Director, Secondary Education. Any response will be attached to this reprimand and included in your personnel file.

cc: Personnel File

Exhibit B

CAPISTRANO VALLEY
HIGH SCHOOL (LOGO)
26301 VIA ESCOLAR MISSION VIEJO, CA 92692
(714) 364-6100

October 11, 1990

To: John Peloza, Biology Teacher

From: Ross Velderrain, Vice Principal

Subject: TEACHING EVOLUTION IN HIGH SCHOOL BIOLOGY CLASSES

I am writing you at the beginning of the school year regarding this subject for several reasons:

1. To provide you with clear direction regarding what the district expects you to teach in the subject of evolution in compliance with the California Department of Education's science framework,
2. To inform you of the State Board of Education's January 13, 1989, policy statement on the teaching of natural sciences, and
3. To reinforce the district's concerns regarding your following course outlines and curriculum guides and not teaching creationism in the classroom.

On June 9, 1989, a meeting was held between Bill Redding, Curriculum Specialist for Science at the Capistrano Valley High School, Thomas Anthony, Principal of the high school, and you and I. During this meeting you were advised that you must always follow course outlines and curriculum guides provided by the district, and that you must not teach creationism in the classroom as it does not comply with the State framework on science. You were advised that you are not to teach religion in the classroom in the context of the subject matter of evolution.

Please be assured that the district is well aware that you have very strong religious beliefs regarding the biblical theory of creationism and that you personally feel it to be a valid scientific theory. While the federal and state constitutions protect an individual's freedom of religious beliefs, when you teach biology, you are expected to follow the State framework and implement appropriate curriculum in the area of evolution.

On January 13, 1989, the State Board of Education adopted a policy statement on the teaching of natural sciences; this statement supersedes the Board's 1972 Anti-dogmatism Policy which was printed as part of the 1984 science framework addendum. The statement specifically addresses the issue of evolution and creationism and reads in pertinent part as follows:

> - "Discussions of any scientific fact, hypothesis, or theory related to the origins of the universe, the earth, and of life (the how) are appropriate to the science curriculum.
>
> - Discussions of Divine creation, ultimate purposes, or ultimate causes (the why) are appropriate to the history-social science and English-language arts curricula.
>
> - Philosophical and religious beliefs are based, at least in part, on faith and are not subject to scientific tests and refutation. Such beliefs should be discussed in the social science

> and language arts curricula. The Board's position has been stated in the Board's adopted policy, Moral and Civic Education and Teaching about Religion (1988), and in the History-Social Science framework (1988).
>
> • Neither the California nor the United States Constitution requires, in order to accommodate the religious views of those who object to certain material or activities that are presented in science classes, that time be given in the curriculum to those particular religious views. It may be unconstitutional to grant time for that reason."

The 1990 "Science Framework for California Public Schools, Kindergarten Through Grade 12" adopted by the California State Board of Education, was developed by the Science Curriculum Framework and Criteria Committee. All references are to the 1990 addition of this framework published by the California Department of Education. The science framework discusses the nature of science in Chapter 1 and the subject of evolution as follows:

> • "Evolution is the central organizing theory of biology and has fundamental importance in other sciences as well. It is an accepted scientific explanation and therefore no more controversial in scientific circles than the theories of gravitation and electron flow."
>
> • The theory of evolution, like other theories, is more than the sum of the facts from which it is derived. It is the best explanation for the facts, and it has predictive value. However evolution has worked – its patterns, processes, mechanisms, and history – composes the theory

> of evolution, which is constantly being modified as new evidence emerges.
>
> • Teachers should be aware that the theory of evolution has been tested and refined for over a 100 years and that the majority of criticisms that find their way into popularly circulated publications have not been validated scientifically; usually, the criticisms have been evaluated and rejected by the scientific community. Teachers should consider the validity of such criticisms carefully before accepting them or deciding whether they are worth "creation science" (or "scientific creationism") has been thoroughly studied by the leading scientific societies and rejected as not qualifying as a scientific explanation.
>
> • Some students may be concerned about evolution and its bearing on their religious beliefs. Teachers – and textbooks – should make it very clear that from a scientific prospective, evolution, like other scientific topics, does not bear on an individual's religious beliefs. Science is not theistic, nor it is atheistic; it does not presuppose with the mechanics, processes, patterns, and history of nature; it is neutral with respect to divinity, the supernatural, or ultimate causes. . . . The way in which scientific understanding is related to religion is a matter for each individual to resolve; thus, the State Board's policy is that there should be a clear separation between science and religion."

In the 1990 science framework, the State Board of Education sets forth six major themes that comprise the big ideas, overarching concepts, unifying constructs or underlying assumptions of the science framework, and which are distinct from facts or concepts. These major themes of science are: 1. Energy, 2. Evolution, 3. Patterns of Change, 4. Scale and Structure, 5. Stability, and 6. Systems and Interactions. In discussing evolution in the context of the major themes of science, the State's curriculum reads as follows:

> - "Evolution in a general sense can be described as change through time, and virtually all natural entities and systems change through time. Evolution embodies history and therefore is a part of every discipline in which history has a role. In order to teach life science, earth science, or astronomy, evolution should be a fundamental, central concept of the curriculum. Evolution, which Darwin described as 'descent with modification' is the central organizing principle in life science."

The concurrent teaching of both evolution and creation science violates a science teacher's professional responsibility to teach science since both the scientific community and the courts have found that "creationism" is not science, rather it meets the definition of a "religion" or "religious belief." Because teachers, among other things, provide role models for their students, it is imperative that a science teacher be a role model for the scientific community and the scientific processes of careful observation, formulation of a hypothesis, and the experimentation and collection of data leading to a conclusion which either supports or rejects the hypothesis. The scientific community as a whole, and its professional organizations such as the American Association for the Advancement of Science (AAAS), the National Academy of Sciences (NAS), the National Science Teachers Association (NSTA) and the American Biology Teachers Association (ABTA), have all found that evolution and its theories have withstood the test of time and that creationism fails to meet scientific criteria as a valid scientific theory.

During the past two school years, concerns have been raised and brought to my attention that you were either openly teaching creationism in your science classes or attacking evolution as an invalid scientific theory based on your belief in creationism. These concerns were brought to my attention by students, parents and other staff members. A review of your 1989-90 lesson plans in the area of evolution buttresses these concerns since your lesson plans are entitled "Evidence in Support and Refutation to Evolution" and you have a separate subsection entitled "Evidence in Refutation to Evolution." My review of your last year's lesson plans in the area of evolution indicates that the clear thrust of these lesson plans is to promote creationism and classify the theory of evolution as a speculative hypothesis and to refute the accepted theory of evolution point by point. Your presentation of the theory of evolution clearly violates both the letter and the spirit of the State curriculum guidelines whose intent is to have evolution taught as one of the main themes of science and that creationism not be taught in the classroom.

Before your Stull Bill goals and objectives are finalized for this year, I am requesting that you provide me with lesson plans that demonstrate how you will meet the objective of teaching evolution in the classroom in compliance with the State science framework and curriculum. Bill Redding, who has had many discussions with you regarding the teaching of evolution and, conversely, that creationism should not be taught in science classes, is available to work with you to assist you in developing lesson plans that present evolution as a valid scientific theory. I am requesting that you have these lesson plans submitted to me by October 16, 1990. I am also available to assist you in meeting this objective.

/s/ Ross Velderrain
Ross Velderrain
Vice Principal

/pa

cc: Harold Hester
Thomas Anthony

Supreme Court, U.S.
FILED
APR 11 1995
OFFICE OF THE CLERK

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No. 94-1423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN E. PELOZA,
Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit, affirming a Rule 12(b)(6) dismissal of Petitioner's federal civil rights complaint. In their Brief in Opposition to the Petition (hereafter "Resp. Br."), Respondents proceed oblivious to the rule that, on a Rule 12(b)(6) motion, the court should have taken as true the well-pled facts of the complaint. Resp. Br. at 2-3 (setting forth various allegations not found in the complaint). Instead, Respondents assert, as though preclusive, facts not found in the pleadings, in their post-*hoc* justification of the 12(b)(6) dismissal.

An unseemly notion pervades Respondents' neat phrasing and argumentation. That ugly idea is that suppression of religion, even factual discussions about it, is an obligation of good government. Compare Resp. Br. at 11-13 (reflecting Respondents' view) with *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517, 522 (9th Cir. 1994), Pet.App. 47a (the ban on answering questions about religion "is a restriction on [Peloza's] right of free speech"). But this Court has never interpreted the Religion Clauses as requiring a relentless extirpation of religion from public schools. Rather, this Court has suggested that "one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization." *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).[1]

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[1] One commentator has suggested that this Court found that the exclusion of certain topics from classroom discussion was improper because that action gave assistance to the religious point of view. *See* ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE, 2nd ed. § 21.5 at 513 (1992). Here, likewise, the exclusion of certain topics from school day discussion is improper, not because such exclusions advance religion, but because

Nonetheless, Respondents insist that Peloza be silenced. Respondents fail to comprehend the principle that the government does not endorse all it fails to censor. ***Board of Education*** *v.* ***Mergens***, 490 U.S. 226, 250 (1990). In ***Mergens***, this Court rejected such "perceived endorsement" arguments. Here, no facts have been alleged or exist in the record to support Respondents' assertions of "perceived endorsement." Hence, this Court should ignore the Respondents' siren song.

REPLY ARGUMENT

I. *TINKER* EMPLOYS A STANDARD MORE DEFERENTIAL TO SPEECH THAN *PICKERING*

Respondents err in concluding that "*Pickering* and *Tinker* are . . . entirely consistent." Resp. Br. at 14. The two cases approach the right to free speech from different levels of deference. Because *Tinker* is more deferential to speech than *Pickering*, it takes no imagination to see how expression protected under *Tinker* would suffer under *Pickering*.[2]

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such exclusions hinder religion and demonstrate, not neutrality, but hostility toward religion and its adherents.

[2] Respondents' effort to sweep the real and substantial conflict in the circuits under the rug is unavailing. They assert that neither *Zykan v. Warsaw*, 631 F.2d 1300 (7th Cir. 1980) nor *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976) "involve teacher rights to speech . . . ." Resp. Br. at 15 n.5. To the contrary of Respondents' assertion, however, are the actual texts of those two cases. *See Zykan*, 631 F.2d at 1302 ("a final set of allegations concerns defendants' decision not to rehire English teacher Teresa Burnau and another teacher"); *Minarcini*, 541 F.2d at 579 (case arose after a school board "issued resolutions which served to prohibit teacher and student discussions of [certain] books in class").

Take, for example, Judge Poole's illustration, in his dissenting opinion in the Ninth Circuit below:

> For example, a student might come to a teacher during lunch and ask about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religionsof the

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Respondents take three decisions, *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), *Miles v. Denver Public School*, 944 F.2d 773 (10th Cir. 1991), *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), and assert that those decisions "conclude that the issue [here] is one of limitations which are reasonably related to pedagogical concerns." Resp. Br. at 15 n.5. But those three decisions, which address restrictions on the *in-class* discussions by teachers, are not conclusive here, where Respondents broadly and sweepingly silenced Peloza throughout the school day and across the campus.

Cf. Ward, 996 F.2d at 452 ("public schools may limit classroom speech to promote education goals. . . . [W]e find that a school committee may regulate a teacher's classroom speech"); *Miles*, 944 F.2d at 777 ("[t]hese responsibilities warrant application of the standard adopted in *Hazelwood*for reviewing regulation of classroom speech"); *Bishop*, 926 F.2d at 1073 ("[h]ence, where the in-class speech of a teacher is concerned, the school has an interest . . . in scrutinizing expression that 'the public might reasonably perceive to bear [its] imprimatur'") (citation omitted).

The conflict exists. Respondents make much of the fact that many decisions cited in the Petition do not involve religious speech. That fact is not in dispute. Respondents are very comfortable with having different tests for the right to freedom of speech, depending on the content or subject matter. Their comfort with an official policy excluding all discussions *about* religion is not decisive, unless their premise — that religion is to be feared, silenced and avoided — is well-taken. This Court's decisions are to the contrary.

world were.

Pet. App. at 53a. If a teacher answered these questions *objectively*, that is to say, with factual information, a school district could not prohibit that communication under the *Tinker* standard. In *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503 (1969), this Court held that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, 393 U.S. at 506. On that general principle, this Court held that restrictions on speech in public schools are valid only where it is shown that the speech causes a substantial interference with the educational mission of the school or substantially interferes with the rights of others. *Id.*, 393 U.S. at 509.

If this Court remains true to *Tinker*, then it seems clear that the communication—from teacher to student—of factual information, such as listing the key points in the spiritual life of Malcolm X, which cannot be predicted reasonably to cause a material and substantial disruption of the school's education mission or to substantially interfere with the rights of others, must be tolerated (if not encouraged).

Tinker's promise is that a school cannot, consistent with the Constitution, interfere with a teacher's objective listing of the "world's seven great religions." In circumstances where no endorsement of religion occurs or coercion of adherence is threatened, *Tinker*'s counsel would be to refrain from interfering with the right to freedom of speech. But such a deferential swath would not be cut, around such speech by a teacher, under *Pickering*.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court, noting that schools have enhanced interests in regulating their employees' speech, analyzed an alleged violation of a public employee's rights in two-steps. First, this Court considered whether the employee's speech addressed a matter of public concern. *Id.* at 572-73. In *Pickering*, this Court concluded that the speech addressed an issue of public concern. Second, this Court held that the government had to prove that the employee would have lost the job notwithstanding the speech. *Id.* at 573-75.

Consequently, every time a teacher's right to speak is brought into question, under *Pickering*, the initial question is not whether a material and substantial disruption of school order has been threatened. Rather, the first question becomes whether the matter addressed by the teacher is one of public concern. 391 U.S. at 572-73. It becomes irrelevant, then, whether any disruption occurred or was threatened. Instead, first school officials and board members and then courts will cogitate whether a discussion, say of Malcolm X, addressed matters of public concern.

Plainly, *Tinker* provides greater solicitude toward speech. Consequently, the Respondents err in concluding that it makes no difference which standard is applied. If the Respondents' believe that it makes no difference which standard is applied, then they should not object to a remand directing the lower courts to apply the *Tinker* standard to this case.

II. *HAZELWOOD* DOES NOT SUPPORT THE BAN ON ANSWERING STUDENTS' QUESTIONS

Respondents argue that the order, barring Peloza from answering students' questions about religion, was justified to "insure that a subsidized teacher is not inculcating religion," Resp. Br. at 13, and that taking such a step reflected Respondents' obedient response to this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

Respondents' assertion is not supported by *Hazelwood.*

In *Hazelwood*, this Court was confronted with a claim that a school district's actions, deleting from a school newspaper two pages which contained articles discussing the impact of divorce on students and discussing certain students' experiences with pregnancy. 484 U.S. at 263. The newspaper, *Spectrum*, "was written and edited by the Journalism II class at Hazelwood East." 484 U.S. at 262. School board funds were allocated for publication of *Spectrum*, and a faculty member, on salary, supervised the production of the newspaper, which was submitted to the school principal for review prior to publication. 484 U.S. at 262-63. The litigation followed a decision by the principal to withhold two pages of one issue from publication, because of concerns about content and fairness. *Id.*

The trial court "concluded that school officials [could] impose restraints on students' speech in activities that are an integral part of the school's educational function — including the publication of a school-sponsored newspaper by a journalism class — so long as the decision ha[d] a substantial and reasonable basis." 484 U.S. at 264 (internal quotation marks and citation omitted). On appeal, the eighth circuit reversed, on the theory that *Spectrum* was a public forum for student speech, which status "precluded school officials from censoring [*Spectrum*'s] contents . . . ." 484 U.S. at 265.

This Court granted certiorari and reversed the judgment of the eighth circuit. 484 U.S. at 266. First, this Court considered and rejected the conclusion of the Eighth Circuit that *Spectrum* constituted a public forum of any sort. 484 U.S. at 267-70. Then, this Court turned to the task of distinguishing *Hazelwood* from *Tinker v. Des Moines Indep. School District*, 393 U.S. 503 (1969). This Court noted:

> The question whether the First Amendment requires a school to tolerate particular student speech — the question [this Court] addressed in *Tinker* — is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

484 U.S. at 271.

Respondents contend that the directive *never* to answer student questions about religion, whether Peloza is on the playing field, in the cafeteria or elsewhere on campus during authorized hours, is justified because "the public might reasonably perceive" that Peloza's answers "bear the imprimatur of the school." But, the posture of this case denies to Respondents any benefit from that argument. This petition arises from a judgment of the ninth circuit affirming a Rule 12(b)(6) dismissal. *See Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994), Pet. App. at 38a *et seq.*[3] The facts before the trial court were those well-pled facts contained in the pleadings, *viz.*, the Complaint. Those facts do not support the conclusions reached by Respondents in their brief at 9-13.

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[3] If, as Respondents apparently believe, the district court converted their Rule 12(b)(6) motion for dismissal to a Rule 56 summary judgment motion, then the district court erred in failing to give notice of its determination to do so and an opportunity to respond. *See* Arg. III, *infra*.

Respondents' leap to judgment cannot be made the basis for a conclusion that the "no questions answered" directive regulates only such speech by Peloza as "the public might reasonably perceive to bear the imprimatur of the school." That conclusion cannot be supported by the facts alleged in the Complaint. Pet. App. at 58a-77a.

But Respondents' incantation of *Hazelwood* suffers from another, more fundamental difficulty. Peloza has not argued that the Respondents must *sponsor* his speech, or that there are no times and no places where appropriate regulations could be imposed on him. Rather, Peloza has asserted only that the issues presented by the *shut up* directive have to do with toleration of speech, not sponsorship. *Toleration* of religion, of course, is a matter about which this Court has expressed its sensitivity. *See, e.g., Lee v. Weisman*, 120 L.Ed.2d 467, 488 (1992) ("there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. . . . [T]hese matters, often questions of accommodation of religion, are not before us"). Respondents' problem is that, when faced with an opportunity to demonstrate sensitivity and toleration to religion, they imposed a rule of silence about religion. *Hazelwood* did not require Respondents to act as they did, and Respondents err in their conclusion to the contrary.

II. THE TRIAL COURT ERRED IN ITS RULING ON THE RULE 12(B)(6) MOTION, BECAUSE IT CONSIDERED MATERIALS OUTSIDE THE PLEADINGS BUT FAILED TO CONVERT THE MOTION TO ONE FOR SUMMARY JUDGMENT.

Respondents urge that the judgment below was "appropriate," in light of documents judicially noticed. Resp. Br. at 17-19. But the trial court erred in considering the documents lodged below by Respondents on the motion to dismiss. The trial court should have converted the motion to a Rule 56 motion, with notice and an opportunity to appropriately brief and present evidence on the converted motion.[4] To have done otherwise was clear error, as this Court has held.

In *Carter v. Stanton*, 405 U.S. 669 (1972) (per curiam), this Court vacated and remanded the judgment of a three-judge district court. *Id.* The district court had dismissed a complaint challenging a state welfare eligibility regulation after it "received evidence upon which to resolve the matter." 405 U.S. at 670. Discussing that point, this Court noted, "it appears that . . . matters outside the pleadings were presented and not excluded by the court. *The court was therefore required by Rule 12(b) . . to treat the motion as one for summary judgment* and to dispose of it as provided in Rule 56." 405 U.S. at 671 (emphasis added). Here, however, the trial court considered the extraneous materials but failed to convert the 12(b)(6) motion to one for summary judgment pursuant to Rule 56.

Respondents' assertion that the judgment was appropriate in light of documents lodged by Respondents and judicially noticed by the court is wrong. The court below erred: it considered extraneous materials, but failed to comply with the requirement of the Federal Rules of Civil Procedure. Respondents' argument is not well-taken.

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[4] The trial court could have been granted leave to the Petitioner to amend his Complaint, which he specifically requested. *See*, Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss at 24 (filed Dec. 23, 1991); Transcript of Hearing on Motion to Dismiss at 30 (hearing held Jan. 6, 1992).

CONCLUSION

The petition should be held pending this Court's decisions in *Rosenberger v. Rector and Visitors of the University of Virginia*, Docket No. 94-329, *review granted*, 63 U.S.L.W. 6346 (Oct. 31, 1994) and *Capitol Square Review and Advisory Board v. Pinette*, Docket No. 94-780, *review granted*, 63 U.S.L.W. 3537 (Jan. 13, 1995). After those decisions are rendered, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of those decisions. In the alternative, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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